No. ____

In The

Supreme Court of the United States

October Term, 1996

DANIEL BOGAN AND MARILYN RODERICK,

Petitioners,

versus

JANET SCOTT-HARRIS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether the First Circuit Court of Appeals erred in affirming the denial of the individual defendants' motions for judgment notwithstanding the verdict on the grounds that, in conflict with this Court and the majority of other circuit courts, it determined that absolute legislative immunity was unavailable to municipal officials as a defense to an action pursuant to 42 U.S.C. § 1983, because of their improper motives and even though the municipal officials challenged actions are quintessentially legislative, *i.e.*, the enactment of a local government budget?

Whether the First Circuit Court of Appeals erred in holding that the individual municipal officials proximately caused the Plaintiff injury pursuant to 42 U.S.C. § 1983, even though the official municipal decision maker acted for lawful reasons to enact a lawful municipal budgetary ordinance?

LISTING OF ALL THE PARTIES

Undersigned counsel for Petitioners, Daniel Bogan and Marilyn Roderick, provide the following list of parties as required by Supreme Court Rule 14(b):

1. Petitioner Daniel Bogan was a defendant in the proceedings in the District Court for the District of Massachusetts and an appellant before the United States Court of Appeals for the First Circuit.

2. Petitioner Marilyn Roderick was a defendant in the proceedings in the District Court for the District of Massachusetts and an appellant before the United States Court of Appeals for the First Circuit.

3. The City of Fall River, Massachusetts, a municipal corporation duly incorporated under the laws of the Commonwealth of Massachusetts, was a defendant in the proceedings in the District Court for the District of Massachusetts and an appellant before the United States Court of Appeals for the First Circuit. The City is not a petitioner.

4. Respondent Janet Scott-Harris was the plaintiff in the proceedings in the District Court for the District of Massachusetts and the appellee before the United States Court of Appeals for the First Circuit.

5. A number of other defendants in the proceedings in the District Court for the District of Massachusetts were dismissed at various points prior to the appeal.

LISTING OF ALL THE PARTIES – Continued

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   b. Bruce Assad; Fall River, Massachusetts

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioners, Daniel Bogan and Marilyn Roderick, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding January 15, 1997.

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts, Hon. Patricia Saris, presiding, is unreported but a copy of the Order denying Defendants' motions for judgment notwithstanding the verdict is appended to this Petition as Appendix A. The opinion of the Court of Appeals for the First Circuit is not yet reported, but a copy of the slip opinion is reproduced in the Appendix as Appendix B. Judgment of the District Court is attached as Appendix C and the First Circuit denial of rehearing is attached as Appendix D.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the First Circuit was published on January 15, 1997. A timely petition for rehearing was denied February 24, 1997. The First Circuit entered judgment on January 15, 1997, and its mandate was stayed on March 7, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL TREATY OR STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Section 1983 of Title 42, Chapter 21 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. The Factual Background.

The City of Fall River is governed by a mayor and city council which consists of nine councillors. The City's fiscal year runs July 1 through June 30. Pursuant to the City's Charter, municipal ordinances may be passed upon proposal by the Mayor and a favorable vote of the majority of the city councillors. In 1987, the Mayor and majority of the City Council enacted an ordinance establishing the Department of Health and Human Services ("DHHS") for the City of Fall River. DHHS was established to oversee pre-existing city departments, including the Public Health Department, the Council on Aging, the Veterans' Agent, and the Buildings and Code Enforcement department. The ordinance required that these departments report to the Administrator of DHHS who would in turn report to the City Administrator.

Janet Scott-Harris, an African-American woman, was selected as the Administrator of DHHS in 1987, at an annual salary of $48,000. During the course of her tenure as Administrator of DHHS, Scott-Harris performed well, but experienced ongoing conflict with and hostility from another city employee, Ms. Dorothy Biltcliffe. Ms. Biltcliffe was employed at the Council on Aging and Scott-Harris had heard Ms. Biltcliffe use racially charged language, including referring to Scott-Harris as a "black nigger bitch" and another African-American employee as "little black bitch." After consulting with Mr. Robert Connors, the City Administrator, Scott-Harris filed a complaint against Ms. Biltcliffe, based on this conduct. Ms. Biltcliffe threatened to use her "influence" in response to the charges. She contacted several people, including Ms. Marilyn Roderick, a City Councillor and chair-person of the ordinance committee.

A hearing on the charges was scheduled and on the day of the hearing, at which Scott-Harris was not present,

Ms. Biltcliffe proposed a settlement of the complaint which included a sixty (60) day suspension. The settlement was accepted by the attorney present on behalf of Scott-Harris and Ms. Biltcliffe was suspended without pay for sixty (60) days. Ms. Biltcliffe's suspension was later reduced by Mr. Bogan, after he became acting Mayor.

In December 1990, the Mayor of Fall River resigned to accept another position. Mr. Daniel Bogan, as president of the City Council, became acting Mayor of the City of Fall River. In January 1991, in preparation for the 1992 Fiscal Year Budget, Mayor Bogan and Mr. Connors requested the various city departments to submit budget proposals which included a 10% decrease in expenses from the previous fiscal year due to the anticipated decline in state aid to the City for 1992. Scott-Harris submitted a budget for DHHS with a proposal to reduce the department's budget through the elimination of vacant positions and reducing nursing services in schools and senior centers.

After receiving the budget proposals, Mr. Connors presented Mayor Bogan with options for reducing the 1992 budget: (1) reduce expenses; (2) reduce capital outlays; and/or (3) reduce personnel. Additionally, Mr. Connors provided Mayor Bogan with a list of vacant positions. In response, Mayor Bogan requested a list of all temporary positions, provisional positions, positions not under contract, positions not protected by Civil Service and positions which had no impact on "front line" service. Mr. Connors provided Mayor Bogan with this list which included Scott-Harris' position as Administrator of DHHS.

In conjunction with other cost saving measures, Mayor Bogan proposed the elimination of DHHS to reduce expenses for fiscal year 1992. In total, 135 city positions would be unfunded or eliminated in the 1992 budget resulting in the actual termination of twenty-seven City employees. In addition, he froze all city employees salaries. While the Administrator of DHHS was the only administrator eliminated on the city employee roster, there were six to seven such positions proposed to be eliminated on the school employee roster.

Because the City of Fall River had created DHHS by ordinance, it could only be eliminated by ordinance. After Mayor Bogan presented his proposed budget cuts to the City Council, including an ordinance eliminating DHHS (hereinafter "the Ordinance"), the ordinance committee of the City Council, chaired by Ms. Roderick, reported out the Ordinance and recommended its passage. Shortly thereafter, a majority of the City Council approved the Ordinance in a six-to-two vote, with Ms. Roderick voting with the majority. Mayor Bogan signed the Ordinance into law eliminating DHHS and therefore eliminating Scott-Harris' position as Administrator of that department. The Ordinance became effective April 1, 1991.

Prior to the passage of the Ordinance, Mayor Bogan and Mr. Connors offered Scott-Harris another city position, Director of Public Health. Scott-Harris rejected that offer shortly before the Ordinance was passed.

B. The Proceedings Below.

1. The District Court Decision.

Scott-Harris then filed suit in the United States District Court for the District of Massachusetts, against the City of Fall River, Mayor Bogan, Ms. Roderick, and other city councillors and officials, in their individual and official capacities, alleging that, by passage of the Ordinance, they had (1) discriminated against her in violation of 42 U.S.C. § 1983 based upon her race (Count I); and (2) discriminated against her in violation of 42 U.S.C. § 1983 based upon her speech protected by the First Amendment (Count II).[1] The district court asserted federal subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3). The district court denied Mayor Bogan and Ms. Roderick's motions to dismiss Counts I and II as to each of them on the grounds of absolute legislative immunity, reserving the issue until after trial.

The district court commenced a nine day jury trial on May 16, 1994. After the completion of the defendants' case, the district court and the parties conducted an

[1] The other defendants included Mr. Connors, John Alberto, John Mitchell, Leo Pelletier, and Michael Plasski. By joint stipulation, the claims against Alberto, Mitchell, Pelletier, and Plasski were dismissed. Additionally, Scott-Harris voluntarily waived her claims pursuant to 42 U.S.C. § 1981, as well as her claims of sex discrimination and wrongful termination, and Count IV, alleging violations of Massachusetts General Laws c. 93, § 102, was dismissed. The district court asserted supplementary jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. At trial, the district court granted Mr. Connors' motion for a directed verdict.

extensive jury charge conference. The result of that conference was a special verdict form which was explained to the jury in detail by the district court. The form, as explained by the court, required the jury to address the liability of the three defendants in a particular order: first the liability of the City (defined as the Mayor and the majority of the City Council), then the liability of Mayor Bogan and Ms. Roderick. The form required and the judge clearly instructed, that if the jury were to find that the City was not liable, then they were to proceed no further with their deliberations.[2] None of the parties objected to the instructions on the record prior to the jury charge.

After the charge was given, the case was submitted to the jury which, in response to the special questions, found that there was no racial discrimination but that Scott-Harris had proven that her protected speech was a substantial or motivating factor in the City's decision to enact the Ordinance. The jury, as required by the instructions and verdict form, then went on to find that both Mayor Bogan and Ms. Roderick proximately caused the

[2] The special verdict form was effectively comprised of four sections: Question 1 through 4 dealt with the City's liability; Questions 5 through 7, and Questions 8 through 10 dealt with Mayor Bogan's and Ms. Roderick's individual liability, respectively; and Questions 11 through 15 then dealt with damages. The form advised jurors that, unless they found that the City had terminated Plaintiff because of her race (Question 2) or because she had engaged in constitutionally protected speech (Question 3), *and* found that the City had thereby proximately caused the Plaintiff injury (Question 4), they were not to address any question pertaining to either individual defendant.

elimination of Scott-Harris' position, and acted maliciously or with reckless indifference to Scott-Harris' rights.

Following the entry of the verdict, the City, Mayor Bogan and Ms. Roderick filed Motions for Judgment Notwithstanding the Verdict which the district court denied. Specifically, the district court rejected Mayor Bogan's and Ms. Roderick's (the "Individual Defendants"), argument that they were entitled to a verdict in their favor on the grounds of absolute legislative immunity. Noting that the First Circuit warranted submitting the question of whether the challenged actions were legislative or administrative to the jury, the court concluded that the Individual Defendants were not entitled to immunity because the jury had found that the proffered reason for the Ordinance was pretextual, and that a substantial or motivating factor in its enactment was Scott-Harris' protected speech. Further, the court noted that the "facially neutral" ordinance had a particularized impact on Scott-Harris as the only employee in the department eliminated by the Ordinance. The combination of these findings by the jury implied that "the ordinance amendment passed by the city council was an individually-targeted administrative act, rather than a neutral elimination of a position which incidentally resulted in the termination of the plaintiff."

2. The First Circuit Opinion.

On January 15, 1997, the First Circuit reversed the district court's denial of the City of Fall River's motion for judgment notwithstanding the verdict, holding that "no reasonable jury could find against the City on the

proof presented." With respect to the Individual Defendants, the Court of Appeals affirmed the denials of their motions notwithstanding the verdict on grounds of legislative immunity, causation and sufficiency of the evidence.

The Court of Appeals, after resolving issues related to the notice of appeal and the jury verdict form, addressed the liability of the municipality for passing a facially benign ordinance for allegedly unconstitutional reasons in violation of Scott-Harris' First Amendment rights. Noting the competing views on the quantum of proof necessary for a plaintiff to prevail under such circumstances, the court assumed that "in a sufficiently compelling case the requirement that the plaintiff prove bad motive on the part of a majority of the members of the legislative body might be relaxed . . . [but] any such relaxation would be contingent on the plaintiff mustering evidence of both (a) bad motive on the part of at least a significant bloc of legislators, and (b) circumstances suggesting the probable complicity of others." The court declined to explicate further on the level of proof necessary, holding that "Scott-Harris has not only failed to prove that a majority of the councilors possessed a bad motive, but she also has failed to furnish enough circumstantial evidence to ground a finding of that, more likely than not, a discriminatory animus propelled the City Council's action." Further, the court noted that Scott-Harris produced no evidence as to seven out of the eight councillors who cast votes on the Ordinance and there was nothing to suggest that the City had deviated from the normal protocol for receiving and enacting ordinances.

The First Circuit then turned to the individual liability of Mr. Bogan and Ms. Roderick. Although the unchallenged jury instructions indicated that if there were no liability against the City there could be no liability against either Mr. Bogan or Ms. Roderick, the court went on to address the individual municipal officials' liability and affirmed the district court's denial of their motions notwithstanding the verdict. Specifically, the court reasoned that the district court properly left the determination of absolute immunity to the jury and that based on the jury's findings regarding the motivating factors for the enactment of the Ordinance, the denial of absolute immunity was proper. Further, the court held that there was sufficient evidence, under traditional tort principles of proximate causation that the individuals were the proximate cause of the enactment of the lawful Ordinance which resulted in the elimination of DHHS. Finally, the court held that there was sufficient evidence to find that Scott-Harris' protected speech was a substantial or motivating factor behind the individuals' actions.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE FIRST CIRCUIT REGARDING THE APPLICABILITY OF ABSOLUTE LEGISLATIVE IMMUNITY TO THE ACTIONS OF MUNICIPAL OFFICIALS CONFLICTS WITH THE OPINIONS OF THIS COURT AND OTHER FEDERAL APPELLATE COURTS.

A. The First Circuit's Opinion Conflicts With Other Circuit Courts' Approaches to Absolute Legislative Immunity In the Context of Municipal Position-Elimination Ordinances.

In *Forrester v. White*, the Court articulated what it deemed a "functional approach" to the applicability of the absolute immunity doctrine. 484 U.S. 219, 224 (1988). Thus, whether a particular official is entitled to absolute immunity derives not from his or her title or position, but rather from the function with which the official has been lawfully entrusted, and the effect exposure to particular forms of liability would likely have on the appropriate exercise of those functions. *Id.* In the legislative context, this functional approach encompasses the determination of whether the challenged actions are legislative (for which there is absolute immunity), or administrative (for which there may only be qualified immunity). Although the circuit courts articulate slightly different standards, the majority rely on whether the action taken is traditionally legislative, involves the formulation of prospective, legislative-type policies rather than enforcement or application of existing policies, and whether the procedures followed in the action are those akin to proper legislative action. *See, e.g., Alexander v. Holden*, 66 F.3d 62,

66 (4th Cir. 1995) (discussing approaches adopted by First, Fifth and Eleventh circuits); *Hughes v. Tarrant County, Tex.*, 948 F.2d 918, 920 (5th Cir. 1991) (distinction to be made is that between establishing a policy or act, and enforcing or administering it); *Ryan v. Burlington County, NJ*, 889 F.2d 1286, 1290 (3d Cir. 1989) (actions must be both substantively and procedurally legislative); *Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984) (two part test focusing on nature of facts used to reach the decision and particularity of impact of the action). Despite these variations, most circuit courts have recognized the same needs at the local or municipal level as those at the state and federal level, and have expanded the doctrine of absolute immunity to include municipal or local officials acting in their legislative capacity. *See, e.g., Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 22 (1st Cir. 1992); *Goldberg v. Rocky Hill*, 973 F.2d 70, 72 (2d Cir. 1992); *Haskell v. Washington Township*, 864 F.2d 1266, 1277 (6th Cir. 1988); *Aitchison v. Raffiani*, 708 F.2d 96, 98-99 (3d Cir. 1983); *Reed v. Shorewood*, 704 F.2d 943, 952-53 (7th Cir. 1983); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349-50 (9th Cir. 1982); *Hernandez v. Laffayette*, 643 F.2d 1188, 1193-94 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *Bruce v. Riddle*, 631 F.2d 272, 274-80 (4th Cir. 1980); *Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 611-14 (8th Cir. 1980).

Although recognizing the difficulty in line-drawing at the local level, the Third, Fourth, Seventh, and District of Columbia circuits, as well as district courts from the Second, Ninth and Tenth circuits have directly addressed

the issue of the entitlement of municipal officials to absolute immunity in the context of position-elimination ordinances. *See, e.g., Carver v. Foerster*, 102 F.3d 96, 100 (3d Cir. 1996) (elimination of government position is legislative, but unilateral order to fire someone is not); *Alexander*, 66 F.3d at 65 (budgetary decisions which may necessarily impact on employment are generally legislative acts); *Roberson v. Mullins*, 29 F.3d 133, 135 (4th Cir. 1994) (termination of employee without eliminating position is unrelated to process of adopting prospective, legislative-type rules and therefore is not shielded by absolute immunity doctrine); *Gross v. Winter*, 876 F.2d 165, 172 n.10 (D.C. Cir. 1989) (personnel actions flowing from traditional legislative functions like budget decisions are the type of actions for which legislators enjoy absolute immunity); *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) (budget making is quintessentially legislative function and job loss as a result of budget process does not make act administrative); *Aitchison*, 708 F.2d at 98 (mayor entitled to legislative immunity for act of voting to pass ordinance eliminating plaintiff's position, regardless of claim of any unworthy purpose); *Rabkin v. Dean*, 856 F. Supp. 543, 547 (N.D. Cal. 1994) (legislative votes affecting positions and salaries of city employees are consistently interpreted as legislative acts); *Racine v. Cecil County*, 843 F. Supp. 53, 54-55 (D. Md. 1994) (position elimination and therefore entitled to absolute immunity); *Drayton v. Mayor & Council of Rockville*, 699 F. Supp. 1155, 1156 (D. Md. 1988) (job elimination through budgetary process is a legislative act entitled to absolute immunity regardless of alleged discriminatory motives), *aff'd*, 885 F.2d 864 (4th Cir. 1989); *Herbst v. Daukas*, 701 F. Supp. 964, 968 (D. Conn. 1988)

(decision to hire or fire generally considered administrative, the abolition of municipal positions constitutes a legislative act); *Ditch v. Bd. of County Comm'rs*, 650 F. Supp. 1245, 1248-49 (D. Kan. 1986) (elimination of a program or job title is a formulation of policy and therefore entitled to absolute immunity), *amended on other grounds*, 669 F. Supp. 1553 (D. Kan. 1987); *Dusanenko v. Maloney*, 560 F. Supp. 822, 827 (S.D.N.Y. 1983) (absolute immunity applied to decision by town officials to reduce salaries), *aff'd*, 726 F.2d 82 (2d Cir. 1984); *Goldberg v. Spring Valley*, 538 F. Supp. 646, 650 (S.D.N.Y. 1982) (individual trustees who approved mayor's action which resulted in elimination of plaintiff's position were entitled to absolute immunity); *see also Berkley v. Common Council of City of Charleston*, 63 F.3d 295, 302 (4th Cir. 1995) (council decision to deny salary increases as part of enacting annual budget was a core legislative function), *cert. denied*, 116 S. Ct. 775 (1996).

According to these cases, individual local government officials involved in the enactment of resolutions or ordinances which are budgetary, eliminate local government positions, and/or restructure local government departments, are entitled to absolute immunity, regardless of their motive, because these actions are legitimate legislative activities as a matter of law. As stated in *Rateree*,

> [B]udget making is a quintessential legislative function, reflecting the legislator's ordering of policy priorities in the face of limited financial resources. When budgets are cut materially in an industry as labor-intensive as that of local government, some people will almost surely

> lose their jobs. But that does not convert a budget cut into an administrative employment decision. . . . Almost all budget decisions have an effect on employment by either creating or eliminating positions or by raising or lowering salaries. This reality, however, does not transform a uniquely legislative function into an administrative one.

852 F.2d at 950 (internal quotations and citations omitted).

In stark contrast, the First Circuit stands alone from these circuits in its application of absolute legislative immunity in the context of municipal officials enacting budgetary legislation and, in particular, position-eliminating legislation. *Compare Scott-Harris v. City of Fall River, et al.*, slip op. at 30-31 (1st Cir. January 15, 1997) (affirming district court's decision that defendants were not entitled to absolute legislative immunity for enactment of ordinance as part of budgetary process because their alleged reason and motives for enactment were improper) *with Rateree*, 852 F.2d at 950 (applying doctrine of absolute immunity to legislators who passed ordinance eliminating municipal positions even though there was evidence the action was targeted at specific individuals for political reasons) *and Gross*, 876 F.2d at 172 n.10 (council member that fired assistant was not entitled to legislative immunity and noting that case was not like *Rateree* where personnel action flowed from budgetary decisions for which legislators enjoyed absolute legislative immunity) *and Aitchison*, 708 F.2d at 98 (mayor entitled to legislative immunity for act of voting to pass ordinance eliminating plaintiff's position, regardless of claim of any

unworthy purpose) *and Rabkin*, 856 F. Supp. at 547 (legislative votes affecting positions and salaries of city employees are consistently interpreted as legislative acts).

The First Circuit's opinion, concluded that the position-elimination ordinance, enacted as part of the City's budgetary process, was not legislative. Rather, the court, in contravention of this Court's opinions and the approaches of other courts, looked behind a facially neutral, position-elimination ordinance to conclude that the Individual Defendants' actions were administrative, not legislative actions.[3] In light of this apparent conflict in the circuits regarding the availability of absolute immunity to local or municipal officials for their actions regarding budgetary and/or position-elimination enactments, substantial questions are presented which warrant resolution by this Court. *See Sup. Ct. R. 10.*

B. The First Circuit's Reliance on Individual Municipal Officials' Motives for Their Legislative Actions Conflicts With This Court's Opinions Regarding Absolute Legislative Immunity.

"The immunity of legislators from civil suit for what they do or say as legislators has its roots in the parliamentary struggles of 16th- and 17th-century England;

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[3] The enactment of the Ordinance was the only allegedly wrongful act at issue in the district court trial and on appeal. Therefore, this is not a case where the plaintiff has alleged conduct preceding or outside the traditional legislative process. *Compare Carver*, 102 F.3d at 99 (issue was whether defendant was entitled to absolute immunity for his pre-vote activity).

such immunity was consistently recognized in the common law and was taken as a matter of course by our Nation's founders." *Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 403 (1979) (extending absolute legislative immunity to members of regional planning board for their legislative acts). In *Tenney v. Brandhove*, this Court clearly articulated both the boundaries and purposes of the doctrine of absolute immunity in the legislative context, 341 U.S. 367, 376-79 (1951) (concluding that individual California legislators acting on investigatory committee were entitled to absolute legislative immunity because they "were acting in a field where legislators traditionally have power to act"); *see also Lake County Estates*, 440 U.S. at 404-06. Discussing the precursor to Section 1983, the Court concluded that Congress did not intend to overturn the common law immunities and constitutional immunities granted to legislators. 341 U.S. at 376-79. Absolute immunity, therefore, protected state legislators from liability under the civil rights statute for alleged injuries resulting from actions taken in the course of "legitimate legislative activity." *Id.* at 376. While the immunity available to legislators was not limitless, the Court stated that "[t]he claim of an unworthy purpose does not destroy the privilege. . . . The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Id.* at 377.

Further, the Court made clear that the courts were not the proper forum to consider the motives of policy

makers engaged in legitimate legislative activity. *Id.* Specifically, Justice Frankfurter, writing for the majority, stated:

> *In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies.* Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province.

Id. at 378 (emphasis added). Thus, by affording legislators the protection of absolute immunity, they would be free to do what they were elected by their constituency to do, unfettered by fear of constituent lawsuits. *Id.* at 376; *see also Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 731 (1980) (concluding that federal and state legislative immunity were coterminous and stating that, in either context, "[t]he purpose of [legislative] immunity is to insure that the legislative function may be performed independently without fear of outside interference"). Therefore, the interests in having legislators perform their duties based on objective criteria rather than fear of retribution from those constituents who may be adversely affected, outweighs the interests of the potentially wronged party in seeking redress from particular individuals.[4]

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[4] This is buttressed by the fact that municipal entities may not avail themselves of any immunity defense. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 106 (1993). Thus, the injured party is not left without all recourse, because they may resort to suit against the municipality (or other legislative body), or to the ballot box. *See Lake County Estates*, 440 U.S. at 405 n.29 ("If the respondents have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests.") (citing *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978)); *Rateree*, 852 F.2d at 951 ("One recourse in dealing with legislators who hide behind their shield of immunity and vote 'improperly' is, of course, a resort to the ballot box."); *Aitchison*, 708 F.2d at 953 (liability against municipality is not precluded simply because legislators may be absolutely immune).

The First Circuit's opinion conflicts with these pronouncements. Relying on its earlier decisions in *Cutting v. Muzzey* and *Acevedo-Cordero v. Cordero-Santiago*,[5] the First Circuit stated that the determination of whether an act is legislative is a question of fact and that the district court properly reserved the issue of the applicability of legislative immunity until trial because there was "conflicted evidence as to the defendants' true motives" for enacting the legislation. Characterizing the Individual Defendants' prior motions to dismiss the action on absolute legislative immunity grounds as "premature",[6] the First Circuit

[5] In *Acevedo-Cordero*, the First Circuit affirmed the district court's denial of the municipal officials' motion for summary judgment on legislative immunity grounds. *See* 958 F.2d at 23-24. The court reasoned that the motion was properly denied because there were genuine issues of material fact as to the motivation for the enactment of the position eliminating ordinance. *Id.* at 23.

[6] In fact, absolute immunity is *intended* to be raised at the early stages of the litigation because its very purpose is to protect legislators "not only from the consequences of litigation's results, *but also from the burden of defending*

rested its affirmance of the district court's decision regarding the motions notwithstanding the verdict on grounds that the trial court properly relied on two findings by the jury: (1) the defendants' [all three defendants] stated reason for enacting the ordinance was not their real reason[7]; and (2) Scott-Harris' protected speech was a substantial or motivating factor in the actions by the Individual Defendants relating to the Ordinance. In essence, therefore, the First Circuit held that the motives underlying the action, rather than the function of the action, *i.e.*, legislative or administrative, was determinative of whether an individual legislator is entitled to the protection of absolute immunity.

Not only is this approach contrary to this Court's pronouncements regarding absolute legislative immunity in *Tenney* and its progeny,[8] but defeats the very purpose

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themselves." Supreme Ct. of Va., 446 U.S. at 731-32 (emphasis added).

[7] Not only is this basis for the denial flawed because it relied on motive, which is clearly an impermissible factor in the absolute immunity analysis, but it clearly contradicts the First Circuit's holding in the beginning of its opinion: that there was insufficient evidence to show that the City (defined as the Mayor and the majority of the City Council) enacted the ordinance for impermissible reasons.

[8] The consideration of motive in the determination of whether an act is legislative or administrative for purposes of absolute immunity has also been disavowed by several circuit courts. *See, e.g., Rateree*, 852 F.2d at 951 (absolute immunity shields conduct that is legislative even though legislator may have acted for seemingly improper motives); *Aitchison*, 708 F.2d at 98 (immunity not lost even if allege bad motive); *Bruce*, 631 F.2d at 280 (quoting relevant language from *Tenney*); *Drayton*, 699 F. Supp. at 1156 (allegations concerning alleged

of the doctrine of absolute immunity, *i.e.*, that when performing certain functions, individual legislators are entitled to be free from the distraction of defending litigation based on actions taken performing those functions. The First Circuit's approach would result in the usurpation of the legal determination regarding immunity by virtue of the fact that a plaintiff ordinarily pleads improper motive when alleging a civil rights action against individuals pursuant to section 1983, and it is generally considered inappropriate to resolve issues of motive at the summary judgment stage. In effect, therefore, every individual defendant would be forced to await the resolution of factual issues regarding their motivation prior to being entitled to absolute immunity. Clearly, this is not what this Court intended absolute immunity to involve and eviscerates the very protections absolute immunity was intended to provide.

Thus, the Petitioners pray that this Court issue a Writ of Certiorari to review the judgment and opinion of the First Circuit because that opinion alters the doctrine of absolute legislative immunity as articulated by relevant decisions of this Court. *See Sup. Ct. R. 10.*

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discriminatory motives not relevant where immunity at issue was absolute).

II.

THE DECISION OF THE FIRST CIRCUIT RAISES AN ISSUE OF SUBSTANTIAL IMPORTANCE REGARDING INDIVIDUAL LIABILITY OF LEGISLATORS PURSUANT TO 42 U.S.C. § 1983.

This case squarely raises an issue of substantial importance regarding the liability of legislators in their individual capacities – whether legislators, at any level of government, may be liable in their individual capacities for the enactment of facially benign and lawful legislation purely on the basis that they harbored an improper animus towards those adversely affected by the lawful legislation. In a departure from established principles of traditional tort law, the First Circuit held that while the official decision making body lawfully enacted facially benign legislation, individual legislators could be found to be the proximate cause of the plaintiff's injury pursuant to § 1983, based *only* on their improper motivation. As such, the opinion opens the door for courts to impose liability on individual legislators despite the existence of a superseding cause, *i.e.*, the enactment of facially neutral legislation by the official decision maker absent evidence of any impermissible purpose or infusion of the individual's improper motivations into the deliberative process. To sanction such an approach, would impermissibly permit courts to hinder the enactment of proper, necessary, and fiscally sound legislation.

As demonstrated by cases from the First Circuit and other circuits, this result cannot stand. Specifically, case law involving somewhat analogous § 1983 claims reflects a recognition, either explicit or implicit, that individual defendants may be liable under § 1983 *only if*: (a) the

action challenged by the plaintiff was improper and (b) the individual defendants played a significant role in shaping or orchestrating the improper action. *See, e.g., Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987) (bail decision was improper because, absent the defendant police officer's misrepresentations, there was no basis for the bail; the defendant police officer "was in all probability the cause of the ruling" made by the clerk who set bail); *Springer v. Seamen*, 821 F.2d 871 (1st Cir. 1987) (summary judgment for individual defendants was deemed improper because, absent misconduct of the individual defendants, there was no basis for the termination decision and plaintiff's entire claim was that his termination was caused by the investigation); *Arnold v. Int'l Business Machines, Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981) (if plaintiff could have pointed to evidence showing that individual defendants had some control or power over state actor, and had directed it to take certain action, there would have been a dispute of material fact on issue of proximate causation under § 1983); *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979) (two inmates were improperly transferred to segregated confinement because the defendant correctional officers submitted false reports and recommendations concerning them and confinement orders were specifically based upon the false reports), *cert. denied*, 444 U.S. 1035 (1980). In all of these cases, the evidence demonstrated that the ultimate decision makers were mere conduits of the defendants' unlawful motivations because they directly relied upon the individual defendants' improper information. Under these circumstances, a finding that the individual defendants' actions

were the proximate cause of the plaintiffs' injuries was found proper.

In the present case, even assuming improper animus on the part of the Individual Defendants, they could have been found to be the proximate cause of the position elimination only if: (a) the decision itself was unlawful, in that a majority of the City Councillors shared their improper animus; or (b) they "hoodwinked" a majority of the City Councillors into believing that the position should be eliminated for budgetary reasons which, unbeknownst to the Councillors, were pretextual. With respect to the first scenario, the First Circuit found that the enactment of the Ordinance itself was not unlawful in that a majority of the City Councillors did not share the Individual Defendants' improper animus. With respect to the second scenario, Scott-Harris chose not to present *any evidence* that the Individual Defendants *had* attempted to "hoodwink" or "fool" a majority of the City Councillors in this fashion. There was *no* evidence introduced that the Individual Defendants made any ongoing or improper efforts to induce other Councillors to act for illicit or impermissible reasons. Under such circumstances, where the causal connection between the Individual Defendants' actions and the alleged constitutional deprivation is too tenuous, there is no basis for imposing liability on individual legislators.

Further, absent evidence that the City Councillors voted to terminate Scott-Harris either for constitutionally impermissible reasons or because they were "hoodwinked" by the Individual Defendants into doing so, there is *no* record evidence that the position elimination decision itself was improper. More specifically, there is no

evidence to support a finding that a majority of the City Councillors took action based upon any factors other than legitimate economic ones. As a matter of law, therefore, the Individual Defendants could not have been the *proximate* cause of any *actionable* injury to Scott-Harris under these circumstances. In other words, the independent action of the official decision maker to enact a facially benign ordinance for proper reasons, must be a superseding cause severing the causal connection between the Individual Defendants' actions and the Scott-Harris' alleged injury.

Finally, the First Circuit's approach raises issues of critical importance from a public policy perspective. Absent a finding that a challenged municipal action is in fact improper, individual legislators and officials involved in the legislation could be held liable for their role in the enactment of perfectly legal and proper legislation. This would be particularly troubling in the context of the instant case, where the challenged legislation has been found to be not only *facially* benign, but was enacted for a benign *reason* as well. The result of a contrary rule would be to invite litigation, regardless of whether the challenged legislation was lawful, and regardless of whether it was enacted for lawful reasons. In such cases, one would pursue an action against as many individual legislators as one could, arguing that if any of them had a "bad" motive and participated *in any way* in the legislative process (regardless of whether they attempted to persuade others of their views), their participation could be a "proximate" cause of the challenged legislation – again, without regard to how lawful the legislation itself

might be. Not only is this approach contrary to traditional principles of tort law, but such an approach would abruptly and forcefully open the door to individual liability, which should be opened only narrowly and with caution.

Because the First Circuit opinion raises an issue of substantial importance regarding the application of traditional tort principles to impose liability on individual legislators, the Petitioners respectfully pray that this Court issue a Writ of Certiorari to review the First Circuit's judgment and opinion. *See Sup. Ct. R. 10.*

CONCLUSION

For the foregoing reasons, Petitioners, Daniel Bogan and Marilyn Roderick, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Dated: April 4, 1997

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS, Plaintiff, v. CITY OF FALL RIVER, MASSACHUSETTS; DANIEL E. BOGAN, individually; ROBERT L. CONNORS, individually; MARILYN RODERICK, individually, Defendants.	CIVIL ACTION NO. 91-12057-PBS

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT

January 27, 1995

SARIS, U.S.D.J.

INTRODUCTION

A federal jury found that plaintiff Janet Scott-Harris had proven that punishment for her protected speech was a substantial or motivating factor in the decision of the defendant City of Fall River to eliminate, by ordinance, her position of Administrator of the Department of Health and Human Services. Accordingly, it found the defendant Fall River liable under 42 U.S.C. § 1983 for compensatory damages, and defendant Daniel E. Bogan, then mayor, and Marilyn Roderick, then vice president of

the city council, liable for punitive damages. All defendants have moved for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b). After hearing, the motions are ***DENIED.***

BACKGROUND

A. Facts

Based on the evidence, the jury could have found the following facts:

1. The Appointment

Plaintiff Janet Scott-Harris, an African-American, was appointed the administrator of the Department of Health and Human Services in Fall River in September, 1987. A resident of Ohio, she had never been to Fall River before. When she was initially interviewed, Robert Connors, the city administrator, offered her a choice of being the Administrator of the Department of Health and Human Services or Director of Personnel. She chose the former position with a salary of $48,600, although it paid less money and did not have civil service or contract protection. Her position was terminated in March, 1991. At the time she was terminated, she was the first and only African-American person ever to have served in a management, supervisory position in the City of Fall River. All agree she did a great job.

Scott was the first person to fill the position of Administrator of the Department of Health and Human Services, as this was a newly created Department. She

managed four divisions: the Public Health Department; the Council on Aging; Code Enforcement; and Veterans Affairs. She was the only person to work for the department, as opposed to the divisions. As three of the division heads were sick or disabled, she effectively ran these divisions. She reported to Robert Connors about two times a week.

2. Run-ins with Roderick

In 1988, defendant Marilyn Roderick was the Vice President of the City Council and Chair of the Ordinance Committee of the City Council. Scott-Harris had several run-ins with Roderick. First, Roderick asked her to hold up building permits for reasons which Scott-Harris disagreed with. Second, they had a confrontation over hiring the youth coordinator position. During an interview with an African-American candidate for the job, Roderick made a reference to one of the candidates as helping "his people" by providing good direction to young people. Scott-Harris abruptly left the interview. Roderick followed and they had a screaming match in Scott-Harris' office about the propriety of referring to the candidate's ethnicity. Knowing that she had offended a key municipal official, Scott-Harris offered her resignation to Connors, who declined it and urged her to stay on. Roderick went to then Mayor Carleton Viveiros to complain. Scott-Harris called to apologize, but Roderick hung up on her. A bitter relationship between the two persisted.

On January 24, 1989, Roderick called her on the carpet at a public committee hearing for failing to recommend a raise for "Dotty" Biltcliffe, who was a nutrition

program assistant on the staff of the Council On Aging, under Scott-Harris' supervision. Biltcliffe, who had known Roderick for over ten years, had called Roderick about the raise.

3. Biltcliffe

Because the head of the Council on Aging was terminally ill, Scott-Harris served as Biltcliffe's immediate supervisor until Paula Gousie, the assistant director, was named acting head. In October, 1990, Biltcliffe was involved in negotiations with a food service provider, and had a disagreement with Gousie. She told Gerard LeTourneau, an assistant manager of the nutrition program, that a secretary was a "little black bitch". Commenting to LeTourneau about Gousie, Biltcliffe didn't mince words, "That little French bitch has her head up that nigger's ass," referring to Scott-Harris. LeTourneau complained to Scott-Harris about the every-day racial slurs and harassment by Biltcliffe of drivers and co-employees and submitted a written statement on October 16, 1990. Scott-Harris consulted with Connors about the appropriate personnel action. In 1988, Connors had ordered Biltcliffe suspended for five days for unauthorized use of a city vehicle. Because Biltcliffe had civil service status, Scott-Harris contacted Sharon Skeels, the head of the personnel department. On October 25, 1990, Scott-Harris prepared the charges for terminating Biltcliffe. When she saw the charges, Biltcliffe told Scott-Harris that she was "nothing but a black nigger bitch", that she "knew people" and Scott-Harris would be "sorry". Biltcliffe went on leave when Scott-Harris told

her the charges, claiming that she had hypertension and could not work.

Originally the hearing on the termination charges was to be held in November, 1990, but there were many delays. The city hired a legally blind attorney in his 80's with hearing problems to represent the city at the hearing. Biltcliffe called Roderick concerning the proceedings, and Roderick discussed the call with Connors who said that the investigation would be handled properly. Biltcliffe had also called another city councillor, who is a close friend of Roderick, to complain about the investigation and the charges.

While the charges were pending, the pressure on Scott-Harris increased. On November 14 or 15, 1990, Roderick sent a memo to Connors complaining about Scott-Harris' use of a city vehicle. Scott-Harris received a phone call from State Senator Tom Norton, who said that Dorothy Biltcliffe called him five or six times a day demanding that he intervene.

Because of federal funding cuts, in November, 1990, Scott-Harris in her budget submission proposed to eliminate four positions from the nutrition program, including Biltcliffe's. However, because of Biltcliffe's civil service status, the elimination of her position simply meant that she was supposed to be reinstated to her former position as an administrative assistant at the Council on Aging. She had been placed on a leave of absence from her permanent civil service job in the Council on Aging to serve in the nutrition position, which was federally funded, but under applicable regulations she had not lost her property rights to her civil service position. However,

because of a bureaucratic snafu, another employee had been permanently appointed to Biltcliffe's old civil service position. Therefore, an unneeded second position was created just for Biltcliffe.

Afraid for her own position because of all the pressure she was feeling regarding Biltcliffe, Scott-Harris wanted to drop the charges against her, as long as Biltcliffe was transferred out of the Department of Health and Human Services. Connors insisted on pressing charges against Biltcliffe because he had "zero tolerance" for racial slurs.

4. The Budget

Meanwhile, the city of Fall River was anticipating local aid cuts for Fiscal Year 1992, which was the year running from July 1, 1991 to June 30, 1992. Generally, the city administrator must put together a budget together with the treasurer and comptroller, and then the mayor submits the budget to the city council for approval by April 30, 1991. By October 1990, the city had to begin making its budget estimation for Fiscal Year 1992.

Defendant Bogan, himself a former city councillor and chairman of the city council, had assumed the position of interim mayor in December, 1990, after former Mayor Viveiros had resigned to become a clerk-magistrate. He stayed in that job until June, 1991. Bogan had been on the screening committee that initially hired Scott-Harris. He also knew Biltcliffe, and had served on a committee with her several years before.

Bogan and Connors expected a cut of local aid between five and ten percent. Connors, as administrator, was instructed to propose a list of lay-offs and proposals to cut costs. Scott-Harris, as Department head, submitted a proposed set of budget cuts which included reducing the hours of school nurses when the children were not in school and of nurses at senior homes on weekends. Bogan rejected this proposal, and decided to cut her position instead. Connors opposed eliminating Scott-Harris' position because he thought she was doing a good job, because the reorganization of the four divisions into a department made sense from a management perspective, and because budget cuts could be accomplished in other ways. Although Connors did not propose cutting Scott-Harris' position, Mayor Bogan made the decision to terminate the position anyway. He testified that he opposed making cuts in front line positions, and that the only reason Scott-Harris was the sole manager cut was because she had no civil service or contract protection. Connors suggested to the Mayor that if the position were cut, Scott-Harris should be offered the position of Director of Public Health.

As mayor, Bogan submitted the proposed ordinance eliminating the Department of Health and Human Services to the full City Council, which then referred it to the Ordinance Committee, consisting of five members. Roderick set the agenda for the Ordinance Committee. Because the Department of Health and Human Services was established by ordinance, it had to be eliminated by ordinance. It held only one position apart from the divisions within it: the administrator. While the ordinance was under consideration, one city councillor called Scott-

Harris to ask "why they were trying to get rid" of her. As noted earlier, the proposed ordinance eliminating Scott-Harris' position had to be passed first by the Ordinance Committee, which Roderick had chaired for nine years. On March 5, 1991, after hearing, the Ordinance Committee reported out the proposed ordinance favorably. The ordinance eliminating the Department of Health and Human Services was passed six to two.

All the councilors knew that eliminating the Department of Health and Human Services was tantamount to terminating Scott-Harris' job because she was the only one independently employed by the "department." The only reason stated during the City Council discussion of the ordinance was the projected shortage of money; no one discussed the Biltcliffe affair, or any dissatisfaction with Scott-Harris' performance.

Altogether, 134 positions were eliminated in addition to Scott-Harris' for fiscal year 1992, of which 40 had already been vacant. But Scott-Harris' position was the first to be terminated, and she was the only management employee laid off, outside of certain administrators within the school department. The other employees did not get notice until three months later in May 15, 1991. Roderick became president of the city council at the end of 1991, and was a mayoral candidate in that year.

The evidence concerning Fall River's actual financial status in 1992 was conflicting and confusing. Fall River did experience an 8 to 10 percent reduction in local aid, depending on how it is calculated. However, the budget for Fiscal Year 1992, submitted on April 30, 1991, appeared to increase by $1 million over the budget for

Fiscal Year 1991. There was evidence that the elimination of Scott-Harris' position actually cost the city more money, because the city ended up hiring administrators for the three agencies – Department of Public Health, Council on Aging, and Veterans Affairs – which she had been running on the side.

Fall River is a plan A city, which means it has a strong mayor. See Mass. Gen. Laws ch. 43, § 46 *et seq.*

5. The Termination

On February 12, 1991, Connors told Scott-Harris of the decision to eliminate the position of Director of Health and Human Services, and informed her that she had the option either of taking the position of Public Health Director, which entailed a $12,000 reduction in salary, or leaving. Scott-Harris proposed merging the positions of Council on Aging and Director of Public Health, but this proposal was rejected by then Mayor Bogan, as well as by Connors. Plaintiff's former position was eliminated, effective April 1, 1991.

On February 28, 1991, Scott-Harris accepted the position as Director of Public Health. In a letter dated March 1, 1991, Bogan informed Scott-Harris that as Director, she had two additional responsibilities not previously assigned to Public Health – Food and Milk, and Weights and Measurements – and that he was moving her office. According to Scott-Harris, these two new areas of responsibility involved many problems, and the office was a "dungeon" on the opposite side of the building, without any carpets.

Insulted and outraged by Bogan's redefinition of the job and the perceived exile to the rear of city hall, Scott-Harris fully intended to the [sic] reject the job and drafted a letter on March 4, 1991 to that effect, which she left on her desk. After talking to her attorney, she calmed down and decided to accept the position. However, the original letter had been purloined and had mysteriously been sent to the mayor's office. That same day, Scott-Harris told the mayor's secretary to rip up the letter, but it was too late. Copies had been circulated to Connors and elsewhere in town hall. On March 6, 1990, although Bogan was aware that Scott-Harris had attempted to retract the original letter, he sent Scott-Harris a letter stating that her last day was to be March 29, 1991. All efforts to contact the mayor failed. Scott-Harris' attorney wrote to Bogan on March 15, but got no response.

6. Post-script

Two days before Scott-Harris' last day on the job, March 27, 1991, the hearing against Dorothy Biltcliffe took place. Skeels was the hearing officer. The action was settled. Dorothy Biltcliffe agreed to a sixty working day suspension without pay. After Bogan received correspondence from Senator Norton, Biltcliffe was reinstated on June 3 rather than on June 21, 1991, over the objection of Connors. Bogan testified that he did not even learn about the Biltcliffe situation until May, 1991, when he received the letter from Senator Norton. Biltcliffe was still working for the city as of the time of trial.

B. Procedure

Just prior to trial, defense counsel moved to dismiss on the grounds that the defendants were entitled to absolute legislative immunity. Relying on *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 23 (1st Cir. 1992), the Court denied the motions. Plaintiff sought to prove at trial that two illicit motives underlay her termination in violation of 42 U.S.C. § 1983. The first was racial discrimination (Count I). The second was retaliation for the exercise of her right, under the First Amendment, to engage in political speech by criticizing the racial attitudes of Biltcliffe and other public servants (Count II). Defendants presented evidence that the only motive for the actions resulting in the elimination of plaintiff's position was budgetary, and plaintiff argued that was a pretext. Neither party presented evidence of "mixed motives," or pressed for jury instructions or a special verdict form on a theory that the city had mixed motives.

After the close of opening statements, all defendants moved for a directed verdict pursuant to Fed.R.Civ.P. 50(a). This was denied. Defendants renewed the motion at the close of plaintiff's evidence. The Court directed a verdict in favor of defendant Connors on the ground there was insufficient evidence from which a jury could find impermissible motivation on his part. The only evidence presented by plaintiff against Connors was that he failed to return her calls after February 12, 1991. This is inadequate in light of the undisputed evidence that Connors was the one who hired Scott-Harris, encouraged her to stay on the job after the first altercation with Roderick, insisted that the charges against Biltcliffe be pressed

when Scott-Harris was willing to drop them, assisted Scott-Harris in presenting charges against Biltcliffe, opposed the termination of Scott-Harris, proposed giving her the job as director of public health, and opposed the early return on Biltcliffe. If anything, he was a stronger advocate than plaintiff in attempting to discipline Biltcliffe. As to the remaining 3 defendants, the motion was denied.

The jury was given a special verdict form, pursuant to Fed.R.Civ.P. 49, which segmented the inquiry into fifteen sequential questions. In the first question, the jury was asked whether plaintiff had proven that the neutral reason proffered by the City was "not the true reason." The following nine questions dealt, as to each defendant in turn, with the requisite state of mind for racial discrimination, the requisite state of mind for punishing free speech, and the causal nexus between defendants' acts and plaintiff's injury. The last five questions dealt with damages. There were no objections to either the verdict form or the instructions.

Although Count I stated a claim under 42 U.S.C. § 1983, the Court, without objection, crafted the first two jury interrogatories in light of *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2746-2747 n.1 (1993) (assuming that the *McDonnell Douglas* framework for claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), was fully applicable to racial-discrimination-in-employment claims under 42 U.S.C. § 1983). In *St. Mary's*, the Supreme Court held that for a plaintiff to prevail, she must show *"both* that the reason [given by defendant employer] was false *and* that discrimination was the real reason." *Id.* at 2749 n.4, 2752. Plaintiff requested that the

two portions of her burden be divided into two questions. *See id.* n.4 ("Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*") (emphasis in original).

The third question was premised on *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 286, 97 S. Ct. 568, 575 (1977), which required plaintiff to prove that her protected speech was a substantial or motivating factor in the decision to eliminate her position. However, presumably because they were not arguing mixed motives, the defendants did not ask for either jury instructions or a special verdict form under the second part of the *Mt. Healthy* analysis. *See Mt. Healthy*, 429 U.S. at 286, 97 S. Ct. at 575 (where there is evidence that an employee would not have been reemployed because of poor performance after plaintiff proved that speech was a substantial factor in the decision not to rehire, the burden shifted to defendant to prove that it would have reached the same decision even in the absence of the protected conduct).

No one anticipated the possible inconsistency created if the jury answered question 1 "no" under the first part of the *St. Mary's* analysis and question 3 "yes" under the *Mt. Healthy* analysis.[1]

In response to Question 3, the jury answered that plaintiff's protected speech was a substantial or motivating factor in the termination of her employment, and

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[1] Indeed, if the case had been argued on a mixed motive theory, the answers would not necessarily have been inconsistent.

awarded damages to plaintiff. But it also found, in it [sic] initial response to the first question, that plaintiff had failed to prove that the reason proffered by the City for her termination was pretextual. The Court voiced concern that these answers could be perceived as inconsistent, and all counsel agreed. However, the solution was not agreed upon. Defendants moved for mistrial. Over the objection of the defendants, this court gave a supplemental instruction, modifying and clarifying the instructions and the jury questionnaire by stating that a "no" answer to Question 1 precluded a "yes" answer to Question 3. Defendants did not object to the substance of the instruction but urged the Court to direct a verdict or grant a new trial based on the inconsistency. The second returned verdict form, which was accepted by the court, responded affirmatively to the first question – finding that the reason for plaintiff's termination proffered by the City *was* pretextual. The jury further found that, while plaintiff had failed to prove racial animus as to any of the defendants, she had succeeded in proving that her constitutionally protected speech in pressing for Biltcliffe's termination was a substantial or motivating factor in the actions resulting in the elimination of her position. On this reasoning, the City was found liable for $156,000 in compensatory damages; Bogan for $60,000 in punitive damages; and Roderick for $15,000 in punitive damages. All three now move for judgment notwithstanding the verdict (JNOV), pursuant to Fed.R.Civ.P. 50(b).

C. Standard of Review

A motion for directed verdict under Rule 50(a) and a motion for JNOV under Rule 50(b) are subject to the same stringent standard. *Censullo v. Brenka Video, Inc.*, 989 F.2d 40, 42 (1st Cir. 1993). A district court may grant a Rule 50 motion

> "only after a determination that the evidence could lead a reasonable person to only one conclusion," . . . namely, that the moving party was entitled to judgment[.] . . . The district court "may not consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence." The trial court is "compelled, therefore, even in a close case, to uphold the verdict unless the facts and inferences, when viewed in the light most favorable to the party for whom the jury held, point so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have arrived at this conclusion."

Biggins v. Hazen Paper Co., Inc., 953 F.2d 1405, 1409 (1st Cir. 1992) (citations omitted). In short, a directed verdict or a JNOV is appropriate only where "there is a total lack of evidence in support of plaintiff's case." *Censullo, supra.*

DISCUSSION

There are four legal objections that would nullify the verdict as to the defendants: (a) that the court was obliged to accept the first verdict form as final; (b) that defendants are entitled to absolute legislative immunity; (c) that there was insufficient evidence against Bogan and Connors to support the award of damages; (d) that there

was insufficient evidence of the intent of the individual legislators from which the jury could find by a preponderance of the evidence that the City possessed the requisite state of mind. Each objection is discussed in turn.

A. The Contradictory Verdict

At the outset, it should be noted that defendants did not challenge the first verdict form itself. Any objection based on the potentially confusing structure of the first form was waived when defendants failed to make a contemporaneous objection, for reasons clearly stated by the First Circuit:

> This court has consistently construed Rule 51 to require that objections to the instructions be raised after the charge to the jury, in order to give the judge an opportunity to correct the error. This rule applies to special interrogatories as well as verbal instructions. . . . As we have repeatedly stated, the use of special interrogatories puts the parties on notice that there might be an inconsistent verdict. "If a slip has been made, the parties detrimentally affected must act expeditiously to cure it, not lie in wait and ask for another trial when matters turn out not to their liking."

Phav v. Trueblood, Inc., 915 F.2d 764, 769 (1st Cir. 1990) (citations omitted). In any event, the Court clarified and cured any deficiency in the verdict form.

What defendants do suggest is that this court must accept the jury's original finding as to question 1, that plaintiff failed to prove that the reason for termination

proffered by the City was pretextual, even though it was arguably inconsistent with the answer to question 3.

Precedent "favors resubmission of a contradictory verdict." *Hafner v. Brown*, 983 F.2d 570, 575 (4th Cir. 1992). *See, e.g., Los Angeles v. Heller*, 475 U.S. 796, 804 n.14, 106 S. Ct. 1571, 1577 n.14 (1986) (Stevens, J., dissenting) (citing cases); *Hauser v. Kubalak*, 929 F.2d 1305, 1308 (8th Cir. 1991). Some judges would go so far as to say that a district court is *obliged* to resubmit a contradictory verdict to the jury. *See Heller*, 475 U.S. at 804, 106 S. Ct. at 1577 (Stevens, J. dissenting) ("[U]pon receiving an apparently inconsistent verdict, the trial judge has the responsibility not to retain half of the verdict, but to resubmit the question to the jury."); *Hafner, supra* ("If the district judge concludes that an inconsistent verdict reflects jury confusion or uncertainty, he or she has the duty to clarify the law governing the case and resubmit the verdict for a jury decision."). This court concludes that, at the very least, it was under no obligation to accept the first submitted verdict form as final, and exercised its discretion in clarifying any inconsistency.

B. Absolute Legislative Immunity

Each of the defendants claims to be shielded by absolute legislative immunity. Plaintiff counters that the jury had reason to find that the acts resulting in the elimination of her position were administrative in nature, and therefore not protected by absolute immunity. All parties agree that this dispute should be resolved by applying the two tests outlined in *Cutting v. Mazzey*, 724 F.2d 259 (1st Cir. 1984):

> The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts," such as "generalizations concerning a policy or state of affairs," then the decision is legislative. If the facts used in the decisionmaking are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on the "particularity of the impact of the state of action." If the action involves establishment of a general policy, it is legislative; if the action "single[s] out specifiable individuals and affect[s] them differently from others," it is administrative.

Id. at 261 (quoting *Developments in the Law – Zoning*, 91 Harv. L. Rev. 1427, 1510-11 (1978)).

Two First Circuit cases have applied the *Cutting* tests. In *Vacca v. Barletta*, 933 F.2d 31, 33 (1st Cir. 1991), the court held that the acting chairperson of a school board was exercising an administrative function when he decided to eject a rowdy school committee member during a debate as to whether, or how, money could be found to cover the cost of hiring 7 new teachers. Consequently, the court reasoned, even if a defendant is entitled to absolute immunity for legislative functions, absolute immunity did not apply. *Id.*

Considerably closer to home is the case of *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20 (1st Cir. 1992). *Acevedo-Cordero* dealt with a city ordinance, proposed by the mayor and passed by the assembly, which purported to eliminate about 600 positions in the city government as a result of a financial crisis. *Id.* at 21, 23. The ordinance

identified specific positions, and by extension, particular employees. Defendants were the mayor, the secretary of human resources, the members of the city assembly, and the city assembly. Plaintiffs claimed that the adoption of the ordinance was a device to discharge them solely because of their political affiliations. The First Circuit joined eight other circuits in holding that absolute immunity protects purely local legislative acts but held that it was a fact question for the jury whether the facially neutral, legislative, cost-cutting ordinance attacked in *Acevedo-Cordero* was simply a ruse, masking a politically-motivated administrative purge of individuals with a certain party affiliation. *Id.* at 23. The upshot is that, in this circuit, the administrative or legislative nature of an employment decision accomplished through traditional legislative functions is a question for the jury. *Contrast Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) (applying the doctrine of absolute immunity to legislators who passed ordinance eliminating municipal positions from the city budget although there was evidence the adverse budget action was targeted specific individuals for political reasons).

Here, none of the parties requested a special jury interrogatory to determine the applicability of the doctrine of absolute legislative immunity. Although it was discussed in the charge conference, all counsel agreed that the fact questions framed by *Acevedo-Cordero* were presented to the jury in the special verdict form by questions one through three, the questions which asked the jury to decide the reasons for the termination of the position. In this case, as counsel recognized, the *Acevedo-Cordero* question is intertwined with the merits. With

respect to the first *Cutting* test, the jury explicitly found that plaintiff had proven the neutral legislative reason proffered by the City – budgetary concerns – was pretextual, and that a substantial or motivating factor was to punish plaintiff's speech. *See infra* Part D.2 (discussing supporting evidence).

With respect to the second *Cutting* test, the undisputed evidence was that the ordinance eliminating the department, although facially neutral, had a particularized impact on plaintiff, the only person employed by the department. Naturally implicit in this combination of findings is the finding that the ordinance amendment passed by the city council was an individually-targeted administrative act, rather than a neutral, legislative elimination of a position which incidentally resulted in the termination of plaintiff. This court therefore concludes that defendants are not shielded by absolute immunity.

C. Insufficient Evidence

After a discussion of the applicable burden structure, the evidence supporting the verdict will be examined.

1. The Significance of Rejecting the Proffered Reason

In the verdict form accepted by this court, the jury explicitly rejected the neutral reason for plaintiff's termination proffered by the defendants. Plaintiff argues that, under the applicable standard, this finding alone, if supported by the evidence, would permit the further finding of liability under Count II, that plaintiff had met her

initial burden of persuasion that the plaintiff's protected conduct was a substantial or motivating factor in her effective termination because there was no evidence of any other motivation.

Plaintiff relies primarily on the First Circuit case of *Acevedo-Diaz v. Aponte*, 1 F.3d 62 (1st Cir. 1993). *Acevedo-Diaz* forthrightly stated that the plaintiff's burden in employment discrimination claims grounded in the First Amendment and section 1983 (claims such as Count II) is different from the burden applicable to employment discrimination cases brought under Title VII of the Civil Rights Act. The First Circuit explained:

> [T]he plaintiff-employee in a Title VII case "retains the burden of persuasion *at all times.*"
>
> By contrast, under the *Mt. Healthy* burden-shifting mechanism applicable to a First Amendment political discrimination claim, the *burden of persuasion itself passes to the defendant-employer* once the plaintiff produces sufficient evidence from which the fact finder reasonably can infer that the plaintiff's protected conduct was a "substantial" or "motivating" factor behind her dismissal. Accordingly, once the burden of persuasion shifts to the defendant-employer, the plaintiff-employee will prevail unless the fact finder concludes that the defendant has produced enough evidence to establish that the plaintiff's dismissal would have occurred in any event for nondiscriminatory reasons.

Acevedo-Diaz, 1 F.3d at 67 (emphasis in original) (interpreting *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 286, 97 S. Ct. 568 (1977)).

Although *St. Mary's* is inapplicable to Count II, its analysis is helpful. The *St. Mary's* court rejected in sweeping terms the suggestion that the plaintiff's case was *necessarily* proven by a showing that the defendant's proffered explanation was pretextual. See ___ U.S. ___ at ___; 113 S. Ct. at 2751. Nevertheless, even under *St. Mary's*, "rejection of the defendant's proffered reasons[ ] will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and. . . . upon such rejection, '[n]o additional proof of discrimination is *required*.' " ___ U.S. ___ at ___, 113 S. Ct. at 2749 (emphasis in original) (citations omitted).

In light of *Acevedo-Diaz*, this court agrees with plaintiff that in the circumstances of this case, rejection of the proffered reason as pretext would permit the jury to infer that the punishment for protected speech was a substantial or motivating factor for the passage of the ordinance, because there was no evidence of any other motivation, and there was circumstantial evidence of the motivation of the mayor and city councilors.

2. Evidence Supporting Rejection of Proffered Reason

Defendants Bogan, Connors, and Roderick all testified that the reason for the action was the perceived need to save money created by the prospect of a cut in state aid the following year; and that the action was part and parcel of a cost-cutting package that eliminated 135 positions and froze the salaries of city employees.

Plaintiff points to the following evidence that, if credited and given weight by the jury, would negate defendants' witnesses' testimony. First, in early 1991, the mayor presented a budget message to the city council that actually projected an *increase* in state aid from the prior year. Second, it cost the City more money to hire the three people to replace her than it would have to continue her employment. Third, Mayor Bogan refused to examine an alternative method of achieving budgetary savings proposed by the plaintiff. Fourth, at the time of the proposed elimination of plaintiff's position (February 1991) no other position had been identified for elimination, and for the next three months no one else was informed of their termination. Fifth, a letter dated May 7, from Sharon Skeels to Mayor Bogan, which purported to list those positions eliminated as part of the budget cutback, made no mention of plaintiff's position.

This court concludes that there existed evidence upon which a rational jury could conclude that budgetary constraints were not the true reason for defendants' actions. It now remains to be seen what evidence existed to suggest that defendants' true reason was illicit – to suggest that retaliation for plaintiff's expression of her opinions was a substantial or motivating factor for the actions of the city.

3. Evidence Produced to Show Bogan's Wrongful Intent

Defendant Bogan argues that there was insufficient evidence upon which a jury could find that he was impermissibly motivated in proposing to the city council that

Scott-Harris' position be eliminated. He fairly points out that there was no direct evidence that he even knew about the disciplinary proceedings against Biltcliffe at the time he recommended eliminating Scott-Harris' position.

However, there was sufficient circumstantial evidence from which the jury could conclude by a preponderance of the evidence that a substantial or motivating factor in his decision to propose an ordinance eliminating her position was to retaliate against her for attempting to terminate Biltcliffe. There was evidence that Biltcliffe had been a longtime city worker who knew Bogan, that she was vociferous in denouncing Scott-Harris to all, including Bogan's friend Roderick, that Biltcliffe used political connections extensively to stop the investigation into her conduct, that Bogan had in fact intervened to shorten Biltcliffe's suspension, that Scott-Harris was doing a great job, that she was the only management employee laid off as a result of the expected decrease in local aid, that she was notified three months before the 134 other people let go, and that Bogan persisted in deciding to let her go over the opposition of the city manager. Moreover, there was evidence that the budgetary reason was a pretext, and that Scott-Harris' termination resulted in an increase, not decrease, in municipal expenditures.

Most significantly, the circumstances of plaintiff's termination support the inference that Bogan was trying to drive her out of city hall. For example, Bogan declined to let her combine two positions – the functions of which she had already been performing – to let her keep her current salary level. Then, when she accepted the position of Director of Public Health at a $12,000 cut in salary, he increased the job responsibilities and shifted her to a less

desirable office. Finally, even assuming he believed she had rejected the position in the letter of March 4, he promptly knew that she was retracting her rejection and wanted to accept the job; yet he refused to allow her to stay despite contacts from an attorney. As Bogan himself testified that Scott-Harris was a good employee, the jury could reasonably have disbelieved his testimony concerning his motive for proposing the elimination of her position and inferred that his real reason for precipitating her departure through this series of hostile moves was to get rid of someone he perceived to be a boat-rocker.

4. Evidence Produced to Show Roderick's Wrongful Intent

The case against Roderick is even stronger, as there was direct evidence that she was aware of the Biltcliffe disciplinary hearings; that Biltcliffe had contacted Roderick before to intervene on her behalf when Biltcliffe believed Scott-Harris was unfair to her in not recommending a salary increase; that Biltcliffe had contacted her again to intervene when Scott-Harris had informed Biltcliffe about the charges against her justifying termination; that Roderick in fact spoke to Connors about the Biltcliffe investigation; and that Roderick and Scott-Harris had already had a contumacious disagreement over charges by Scott-Harris that Roderick had made an inappropriate racial comment during an interview. This direct evidence, in combination with the evidence refuting the financial need for the elimination of the position, supports the jury finding.

D. The City

The verdict against the City of Fall River is supportable only if plaintiff produced evidence showing that punishing her for the exercise of her free speech rights was a substantial or motivating factor in the city's action. The court instructed the jury, without objection, that "the city" was to be defined as "the Mayor and a majority of the City Council." Defendants now argue that, to carry its burden of proof, the plaintiff was obliged, as a matter of law, to prove that five individual legislators who voted in favor of the ordinance amendment (those five constituting a majority of the city council) were motivated by an intention to violate her free speech rights. They further argue that evidence of intent was submitted only as to Mayor Bogan and Councillor Roderick.

1. Municipal Liability

Before addressing defendants' argument concerning the proper method of proving collective intent, it may be helpful to clarify why the court may not resort to the expedient of directly imputing liability to the city from the individual actions of Bogan and Roderick. Although municipalities are considered "persons" within the meaning of section 1983, the constitutional deprivation must have its origin in a policy of a municipality. *Monell v. City of New York Dept. of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2108, 2037 (1978). Municipalities cannot be held liable on a theory of *respondeat superior*. *Monell*, 436 U.S. at 691, 98 S. Ct. at 2036.

In *Pembaur v. Cincinnati*, 475 U.S. 469, 480-83 & n.12, 106 S. Ct. 1292, 1298-1300 & n.12, the Supreme Court articulated the following test for determining what acts of a municipal officer triggers municipal liability under section 1983: (1) acts which the municipality officially sanctioned or ordered such as a decision of a properly constituted legislative body like a city council; (2) acts of municipal officers with final policy-making authority, as defined by state law; and (3) acts taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area.

A municipal official's actions subject to review procedures do not amount to a complete delegation of authority so as to trigger section 1983 liability. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 125, 108 S. Ct. 915, 924 (1988). Accordingly, even where a city charter establishes a "strong mayor" type government, a mayor is not the ultimate policy making authority where the city charter gives the city council the power to override the mayor's veto. *See, e.g., Manor Health Care Corp. v. Lomelo*, 929 F.2d 633, 637 (11th Cir. 1991) (even where a mayor's de facto powers cause the city council to defer in substantial part to his judgment with respect to zoning, the mayor does not become a final policy maker with regard to zoning where the city council has the power to review and veto the zoning ordinance.); *Worshan v. City of Pasadena*, 881 F.2d 1336, 1340 (5th Cir. 1989) (mayor's action of indefinitely suspending city employees was not the act of the city because the city council was empowered to review the decision of city officers); *Williams v. Butler*, 863 F.2d

1398, 1404 (8th Cir. 1988) (en banc) (an incomplete delegation of authority *i.e.*, where the right of review is retained, will not result in municipal liability).

The Charter of the City of Fall River, Article II, Sections 18, 20 and 21, provides that a majority of all members of the city council shall be necessary to adopt any ordinance; and that every ordinance adopted by the city council must be presented to the mayor for his approval. If the mayor approves it, the ordinance shall be in force. If he disapproves the ordinance, the city council must pass the ordinance by a two-thirds vote of all its members to be in force. *See generally* Mass. Gen. Laws ch. 43, § 55.

As the mayor and city council shared the decision as to the elimination of a department by ordinance, and there was no evidence that the city developed a custom or practice which allowed the mayor to function without any supervision or review regarding such issues, the municipality is liable only if plaintiff proves the mayor and majority of city councillors were impermissibly motivated. The municipality is not liable under *Monell* and *Pembaur* for the individual actions of Roderick and Bogan, because they did not have final policy-making authority.

2. Legislative Intent

Directly inquiring into the subjective intent of a legislative body is a famously "perilous enterprise," and is ordinarily disfavored in constitutional law. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 636-39, 107 S. Ct. 2573,

2605-07 (1987) (Scalia, J., dissenting) (discerning the subjective motivation of those enacting the statute is, to be honest, almost an impossible task"); *Palmer v. Thompson*, 403 U.S. 217, 225, 91 S. Ct. 1940, 1945 (1971); *United States v. O'Brien*, 391 U.S. 367, 383, 88 S. Ct. 1673, 1682 (1968); *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257-62 (4th Cir. 1989).

The ordinance at issue here, because it is alleged to infringe a particular individual's fundamental right, would fall into that exceptional class of cases where it is appropriate to admit the testimony of individual legislators, including the mayor and vice president of the city council, concerning legislative intent. *See F.O.P. Lodge No. 121 v. City of Hobart*, 864 F.2d 551, 555 (7th Cir. 1988) (Posner, J.). But even in such cases, it is recognized that the value of direct testimony by legislators is distinctly limited.

In its most extensive rumination on the nature of evidence tending to show that a piece of legislation is wrongfully motivated, the Court noted that, even when unprotected by privilege, individual legislators will be asked to testify only "[i]n some extraordinary instances." *Village of Arlington Hts. v. Metropolitan Housing Dev.*, 429 U.S. 252, 265-69, 97 S. Ct. 555, 563-65 (1977). More usually, wrongful legislative intent will be shown more indirectly, for instance through the effects of the legislation, the history of the legislation, patterns of similar legislative acts, and the sequence of events leading up to the legislation. *Id.* Justice Stevens made this point aptly in another case involving a challenge to legislation on the grounds of racial discrimination:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation.

Washington v. Davis, 426 U.S. 229, 253, 96 S. Ct. 2040, 2054 (1977) (Stevens, J., concurring).

Given the known difficulties in assessing the subjective intent of legislative decision-makers, some courts have held, in the state employment rights context, that a fact-finder can reasonably infer discriminatory intent of a governmental body based on circumstantial evidence of discriminatory intent of members of that body, particularly those in leadership positions in the collective decision-making. *See Southern Worcester Cty. v. Labor Relations Comm'n*, 386 Mass. 414, 421, 436 N.E.2d 380, 385 (1982) ("[I]t is not fatal to the teachers' claims that only three of the seven members of the school committee made antiunion statements [as well as the superintendent who recommended the decision not to reappoint the teachers to the committee]. We adhere to the rule that adequate proof in civil and criminal cases may come from either direct or circumstantial evidence, or both."); *Northeast Met. Reg. Vocational Sch. Comm. v. Massachusetts Comm'n Against Discrimination*, 31 Mass. App. Ct. 84, 89, 575 N.E.2d 77, 81 (1991) ("While it is true that the committee was comprised of twelve members and there was direct evidence of sexual bias exhibited by only two of its members [the

chairman of the selection committee and of the committee itself], this is not fatal to the complainant's case. The complainant can establish proof of gender discrimination by direct or circumstantial evidence or both.") (citations omitted).

Finally, it is well established that, as a general matter, to prove discriminatory animus in the analogous area of Title VII claims, a plaintiff may rely on circumstantial evidence. *See Mesnick v. General Electric Co.*, 950 F.2d 816, 824 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2965 (1992) ("To prove the [employer's] discriminatory animus, [the] plaintiff is not required to come forward with evidence of the 'smoking gun' variety."); *see also Connell v. Bank of Boston*, 924 F.2d 1169, 1175 (1st Cir. 1991) (similar); *Herbert v. Mohawk Rubber Co.*, 872 F.2d 1104, 1115 (1st Cir. 1989) ("Circumstantial evidence is expected in discrimination cases given the complexity of the issues and the difficulty, in this rights conscious era, of producing direct evidence of discrimination."); *see also Resare v. Raytheon Corp.*, 981 F.2d 32, 42 (1st Cir. 1992) (similar).

3. Evidence Produced to Show the City's Wrongful Intent

Defendants emphasize that there was no direct evidence about the motivation of the majority of the city council. Even if the mayor and vice chairperson of the city council were impermissibly motivated, under *Pembaur* and its progeny Fall River is not liable unless a majority of the city council was similarly motivated. Accordingly, if the desire to punish Scott-Harris for her

speech were a hidden agenda of the individual defendants, and the majority of the city council voted for purely budgetary reasons, the city would not be liable. However, to prevail plaintiffs may rely on circumstantial evidence of the motivation of a majority of the city councillors. It is too high a burden to place on a civil rights plaintiff to require her to present direct evidence of motivation of a majority of a legislative body.

While it is a close question, the jury could reasonably have inferred that a substantial or motivating factor in the city's decision to eliminate the position was punishment for protected speech based on the following circumstantial evidence. First, there was no alternative explanation considered by the jury to be plausible. Second, two highly influential figures, the mayor and vice chair of the city council, were impermissibly motivated. Third, two other city councilors were aware of the controversy – one telephoned Roderick to discuss the Biltcliffe affair in connection with the vote to eliminate the department, and a second talked with plaintiff about the same matter. Fourth, there was evidence showing Biltcliffe to be a person who habitually and vociferously sought to exercise political influence. Fifth, the vote to eliminate the department occurred at a time when the Biltcliffe controversy was at its peak. Sixth, the only practical effect of the department elimination was to terminate plaintiff. Seventh, the city later took another action, by assent of the mayor and a majority of the city council, that redounded to Ms. Biltcliffe's personal benefit – namely, the creation of a new position for her in the 1992 budget, characterized by plaintiff as a sinecure.

ORDER

For the foregoing reasons, the Motion of the Defendant, the City of Fall River, for Judgment Notwithstanding the Verdict Pursuant to Fed.R.Civ.P. 50(b) (Docket No. 86) is denied. The Motion of the Defendant, Marilyn Roderick, for Judgment Notwithstanding the Verdict Pursuant to Fed.R.Civ.P. 50(b) (Docket No. 90) is denied. The Motion of the Defendant, Daniel Bogan, for Judgment Notwithstanding the Verdict Pursuant to Fed.R.Civ.P. 50(b) (Docket No. 92) is denied.

/s/ Patti B. Saris
PATTI B. SARIS
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 95-1950
95-1951
95-1952

JANET SCOTT-HARRIS,
Plaintiff, Appellee,

v.

CITY OF FALL RIVER, ET AL.,
Defendants, Appellants.

No. 95-2100

JANET SCOTT-HARRIS,
Plaintiff, Appellant,

v.

CITY OF FALL RIVER, ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: January 15, 1997

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The plaintiff's cross-appeal (No. 95-2100) is denied and the district court's

order permitting the reopening of the appeal period is affirmed. The judgment against the City of Fall River is reversed, and the fee award against it is vacated. The judgments against the remaining defendants are affirmed and the case is remanded to the district court for further proceedings in respect to both the previous fee award against these defendants and the question of fees on appeal. No costs are awarded in Nos. 95-1950 and 95-2100; costs are awarded to the plaintiff in Nos. 95-1951 and 95-1952.

By the Court:

WILLIAM H. NG

Clerk.

United States Court of Appeals
For the First Circuit

Nos. 95-1950
95-1951
95-1952

JANET SCOTT-HARRIS,
Plaintiff, Appellee,

v.

CITY OF FALL RIVER, ET AL.,
Defendants, Appellants.

No. 95-2100

JANET SCOTT-HARRIS,
Plaintiff, Appellant,

v.

CITY OF FALL RIVER, ET AL.,
Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Patti B. Saris, *U.S. District Judge*]

Before

Selya, *Circuit Judge*,
Aldrich, *Senior Circuit Judge*,
and Boudin, *Circuit Judge*.

Harvey A. Schwartz, with whom *Schwartz, Shaw & Griffith* was on brief, for plaintiff.

Stephen C. Fulton, with whom *Law Office of Bruce R. Fox* was on brief, for defendant City of Fall River.

Bruce A. Assad for defendant Marilyn Roderick.

Robert J. Marchand, with whom *Driscoll, Marchand, Boyer & Stanton* and *Mary E. O'Neil* were on brief, for defendant Daniel Bogan.

January 15, 1997

SELYA, *Circuit Judge.* Although America began with the vision of a city on a hill, not every American has shared a sense of optimism about our nation's municipalities. Indeed, one of the most illustrious of the Framers regarded great cities as "pestilential to the morals, the health, [and] the liberties of man." Christopher Tunnard, *The City of Man* 34 (1970) (quoting Thomas Jefferson).

In this vein, American legal institutions have begun over time to view cities with a certain constitutionally based suspicion. Thus, in *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 691 (1978), the Supreme Court ruled that municipalities could be held liable under 42 U.S.C. § 1983 for deprivations of federally protected rights which occurred "pursuant to official municipal

policy of some nature."[1] *Monell* opened the floodgates for an outpouring of such suits against municipalities.

The case at hand is one example of the genre. At trial, a jury found the City of Fall River (the City) and two municipal officials liable under section 1983 for the passage of a facially neutral ordinance that abolished the plaintiff's job. The defendants' appeals raise a tantalizing question about whether a discriminatory animus displayed by fewer than the minimum number of city council members whose votes would be required to enact an ordinance can (or should) be imputed to the municipality itself. Other interesting questions abound, including questions dealing with causation in the context of constitutional torts and the availability of legislative immunity defenses in that setting. Before addressing any of these issues, however, we must parse Fed. R. App. P. 4 (a)(6) for the first time and determine whether the defendants have brought their appeals in a timeous fashion.

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[1] The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994). The upshot of the *Monell* decision is that a municipality is a "person" for purposes of section 1983, and, hence, amenable to suit for violations thereof. *See Monell*, 436 U.S. at 690.

I. A TALE OF ONE CITY

Many of the facts in this case are conflicted. We present them as best they have presented themselves, occasionally resolving disparities as the jury permissibly might have done. *See, e.g., Veranda Beach Club Ltd. Partnership v. Western Sur. Co.*, 936 F.2d 1364, 1375 (1st Cir. 1991) (discussing standard for appellate review of post-verdict challenges to evidentiary sufficiency).

The City hired the plaintiff, Janet Scott-Harris, as the administrator of the newly created Department of Health and Human Services (HHS). When Scott-Harris entered the City's service in 1987, she became the first African-American ever to hold a managerial position in the municipal government. By all accounts she performed quite well at HHS. Withal, she did not enjoy a problem-free relationship with the City's political hierarchs. In 1988, for example, she clashed with Marilyn Roderick, the vice-president of the City Council. Scott-Harris believed that Roderick made inappropriate references to an aspirant's ethnicity in the course of an employment interview and stormed out of the room. Shortly thereafter, she engaged in a shouting match with Roderick. When Scott-Harris subsequently attempted to apologize, Roderick hung up the telephone.

Scott-Harris' difficulties with Roderick did not end with the aforedescribed incident. There were periodic flare-ups – by way of illustration, Roderick wrote a letter to the City Administrator, Robert Connors, protesting Scott-Harris' use of a City-owned motor vehicle – but it was Scott-Harris' reaction to the dysphemisms spouted by Dorothy (Dot) Biltcliffe, a nutrition program assistant

for the City's Council on Aging (COA), that precipitated internecine warfare. In the fall of 1990, Scott-Harris learned that Biltcliffe had been making offensive comments. In one instance, referring to her co-worker Paula Gousie and to Scott-Harris, Biltcliffe remarked: "That little French bitch has her head up that nigger's ass." In another, Biltcliffe referred to a secretary as "a little black bitch." Scott-Harris spoke out against this racist invective and, because COA operated under her general supervision, she consulted with Connors and then drew up a set of charges against Biltcliffe as a prelude to dismissal.

The pendency of these charges did not improve Biltcliffe's manners; she called Scott-Harris "a black nigger bitch" and warned that there would be repercussions because Biltcliffe "knew people." Biltcliffe unabashedly pressed her case with two city councilors (Roderick and Raymond Mitchell) and a state senator who, in turn, called Roderick. After numerous postponements the City held a hearing on March 27, 1991. This resulted in a settlement under which Biltcliffe agreed to accept a 60-day suspension without pay. Mayor Daniel Bogan subsequently intervened and pared the punishment substantially.

During this time frame the City's financial outlook worsened. Municipal officials anticipated that state aid would decline up to 10% in the next fiscal year (July 1, 1991 to June 30, 1992). Mayor Bogan directed Connors to prepare a list of proposed budget cuts to accommodate the anticipated reduction in funding. Connors asked his department heads, including Scott-Harris, for their input. Scott-Harris recommended reducing the hours of school nurses. Bogan rejected this suggestion and, over Connors'

objection, insisted that Scott-Harris' position be eliminated.

Because the post had been created by municipal ordinance, its abolition necessitated the same procedural formalities. The City Charter requires the votes of a majority of the nine members of the City Council for passage of such an ordinance. The mayor often submits proposed legislation to the City Council, and, in addition, he must approve every enacted ordinance (or else the Council must override his veto). In February 1991 Bogan asked the Council to do away with Scott-Harris' position. On March 5 the ordinance committee, chaired by Roderick, reported out an emendatory ordinance designed to achieve this end and recommended its passage. Three weeks later the City Council voted six-to-two (Roderick voting with the majority) to approve the position-elimination ordinance. Bogan signed it into law.

At about the same time that he moved to incinerate Scott-Harris' job, Bogan offered her a different portfolio – Public Health Director – which paid approximately $12,000 less per annum. Scott-Harris accepted the offer by letter dated February 28, 1991, but a follow-up communique from Bogan added extra duties and shifted Scott-Harris to a less desirable office. Disappointed, Scott-Harris drafted a letter rejecting the job offer. That letter mysteriously arrived at the mayor's office and was acted upon by Bogan despite Scott-Harris' efforts to retract it. Scott-Harris' tour of duty with the City ended on March 29, 1991 – two days after the hearing that led to Biltcliffe's suspension. She filed suit several months later.

II. THE LITIGATION

Solon, the fabled Greek legislator, once characterized the best type of city as one "in which those who are not wronged, no less than those who are wronged, exert themselves to punish the wrongdoers." Plutarch, *Plutarch's Lives* 455 (Bernadotte Perrin trans., 1914). Here, the plaintiff's complaint alleged in substance that the City and certain municipal officials[2] inverted the Solonic ideal: when the plaintiff responded forcefully (but appropriately) to Biltcliffe's racial slurs, the defendants sided with the wrongdoer and instead punished Scott-Harris by ousting her from her position under a blatant pretext. The plaintiff alleged that, in so doing, the defendants abridged her First Amendment rights and set the stage for redress under section 1983. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (explaining that in order to prevail on a section 1983 claim based on the First Amendment, the plaintiff must prove that her protected speech was a substantial or motivating factor in the decision to eliminate her job).

At trial the defendants asserted that their motives in passing the challenged ordinance were exclusively fiscal. The plaintiff disagreed, contending that racial animus and a desire to punish her for protected speech, not

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[2] The plaintiff originally sued a plethora of defendants. She quickly narrowed the field to Connors, Roderick, Bogan, and the City. During the ensuing trial, the judge directed a verdict in Connors' favor. The plaintiff has not contested that ruling, and we discuss these appeals as if Bogan, Roderick, and the City were the sole defendants.

budgetary constraints, spurred the introduction and passage of the ordinance. On May 26, 1994, evidently persuaded by the plaintiff's efforts to connect Dot to her dismissal, the jury returned a verdict against all three defendants.[3]

The verdict form memorialized the jury's conclusions (1) that the plaintiff's constitutionally protected speech was a substantial or motivating factor both in Bogan's decision to recommend enactment of the ordinance and in Roderick's decision to work for its passage, and (2) that these actions proximately caused the extirpation of the HHS director's position. As originally returned, the verdict form added an inconvenient wrinkle; it indicated that the plaintiff had not proven that the City's professed desire to enact the ordinance for budgetary reasons was pretextual. Out of the jury's earshot, the judge expressed her concern that the jury's findings were internally inconsistent. After a brief colloquy, she resubmitted the case to the jury with appropriate supplemental instructions. Shortly thereafter the jury returned a revised verdict form which reiterated everything except the "no pretext" finding. In that wise, the jury, having reconsidered the matter, now concluded that the City's stated reason for wanting the ordinance – budgetary concerns – was not its true reason.

The jury assessed compensatory damages against all three defendants, jointly and severally, in the amount of $156,000; found Bogan liable for punitive damages in the

[3] The jury found against the plaintiff on her race discrimination claim, and she does not contest that finding here.

amount of $60,000; and found Roderick liable for punitive damages in the amount of $15,000.[4] The court subsequently denied the defendants' motions for judgment notwithstanding the verdict. These appeals followed – but not without a perturbing procedural prelude.

III. THE NOTICES OF APPEAL

Rule 4(a)(1) of the Federal Rules of Appellate Procedure requires that notices of appeal "be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from." Compliance with this rule is mandatory and jurisdictional; while a court may construe the rule's strictures liberally, it may not wink at them. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988); *Air Line Pilots Ass'n v. Precision Valley Aviation, Inc.*, 26 F.3d 220, 223 (1st Cir. 1994).

In this instance the district court entered the appealable order – the order denying the defendants' post-trial motions for judgment n.o.v. – on January 30, 1995. The defendants did not file their notices of appeal until August of that year. Without more, Rule 4(a)(1) would bar the maintenance of these appeals.

The appeal period denominated by Rule 4(a)(1) is, however, subject to an occasional exception. One such

[4] Although punitive damages may lie against individuals in a section 1983 action, *see, e.g., Keenan v. City of Philadelphia*, 983 F.2d 459, 469-70 (3d Cir. 1992); *Davet v. Maccarone*, 973 F.2d 22, 27 (1st Cir. 1992), they are not available against a municipality. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

exception, added to the Appellate Rules in 1991, provides:

> The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of the entry of the order reopening the time for appeal.

Fed. R. App. P. 4(a)(6). The mention of "notice" in Rule 4(a)(6) is a reference to Fed. R. Civ. P. 77(d), which provides:

> Immediately upon the entry of an order or judgment the clerk shall serve a notice of entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

These rules lie at the center of the jurisdictional jumble that confronts us. On the defendants' motions, the district court held a hearing and determined that Fed. R. App. P. 4(a)(6) appropriately could be invoked to excuse

the defendants' seeming tardiness. The plaintiff's cross-appeal challenges this determination. Because Rule 4(a)(6) is relatively new, we have not yet had occasion to construe it. We do so today, deciding at the outset that the standard of review which governs a district's court's determinations under Rule 4(a)(6) is abuse of discretion. *Accord Nunley v. City of Los Angeles*, 52 F.3d 792, 794 (9th Cir. 1995).

Certain elements of the Rule 4(a)(6) calculus are essentially undisputed: the defendants were parties entitled to notice of the entry of the appealable final order; their Rule 4(a)(6) motions, filed on April 10 and 11, 1995, came within 180 days of the entry of that order; and no party would be subjected to cognizable prejudice by the granting of the motions. Thus, the decisive questions in this case relate to whether the defendants received notice of the entry of the order within 21 days, and if not, whether they filed their Rule 4(a)(6) motions within seven days of the time when they eventually received such notice.

Both of these questions involve an appreciation of the kind of notice that Rule 4(a)(6) contemplates. In terms, Rule 4(a)(6) advances a unitary concept of notice; its two references to "such notice" plainly relate back to the phrase "notice of the entry of a judgment or order." The problem, exemplified by this case, is that the rule does not specify whether that notice must be written notice or actual notice. That problem defies facile solutions, and the courts of appeals which have addressed it thus far have not achieved consensus. *Compare Avolio v. County of Suffolk*, 29 F.3d 50, 53 (2d Cir. 1994) (holding that the rule contemplates written notice) *with Nunley*, 52 F.3d at 794

(holding that actual notice suffices) and *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357, 359 (8th Cir. 1994) (same). Though we acknowledge that the phrase, *simpliciter*, is susceptible of multiple interpretations, we believe that the references to "notice" in Rule 4(a)(6), taken in context, are best read as requiring written notice.

Our starting point is our perception that Appellate Rule 4(a)(6) and Civil Rule 77(d) must be read *in pari passu*. *Accord Nunley*, 52 F.3d at 795. The text of Rule 77(d) requires the clerk to serve the notice of entry of an order or judgment "by mail." Because a mailed notice is invariably written, it seems logical to conclude that when reference is made later in the text to "lack of notice of the entry," that reference contemplates lack of *written* notice.

We think that further evidence to the same effect can be gleaned from the scrivenings of the Advisory Committee. The Advisory Committee's Notes are entitled to weight in interpreting federal rules of practice and procedure. *See Whitehouse v. U.S. Dist. Ct. for Dist. of R.I.*, 53 F.3d 1349, 1364-65 (1st Cir. 1995). Here, they tell us that Rule 4(a)(6)

> provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to [Rule 77(d)], is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal.

Fed. R. App. P. 4(a)(6), Advisory Committee's Notes. The statement "required to be mailed" refers to "notice of entry of a judgment or order," again suggesting that the

notice must be in writing. We believe that when a procedural rule uses the precise phrase employed by the Advisory Committee, it can reasonably be inferred that the phrase means the same thing in both contexts.

Policy concerns point us in the same direction. Reading Rule 4(a)(6) to require written notice will simplify future proceedings. As the familiar request to "put it in writing" suggests, writings are more readily susceptible to proof than oral communications. In particular, the receipt of written notice (or its absence) should be more easily demonstrable than attempting to discern whether (and, if so, when) a party received actual notice. Such a scheme not only takes much of the guesswork out of the equation, but also, because Rule 77(d) specifically provides that parties who do not wish to rely upon the clerk to transmit the requisite written notice may do so themselves, the scheme confers certitude without leaving a victorious litigant at the mercy of a slipshod clerk.

To sum up, we hold that written notice is required to trigger the relevant time period under Rule 4(a)(6); oral communications or other forms of actual notice will not serve. We now apply this holding to the facts at hand.

The district court found that the defendants did not receive written notice of the entry of the operative order until April 7, 1995, when the plaintiff's counsel sent them a demand letter seeking satisfaction of the judgments. The court made this finding against a backdrop of unusual events. The defendants' motions for judgment n.o.v. were argued on September 29, 1994. During that session, an unrecorded sidebar conference occurred. The court's comments at that conference left all counsel with

the distinct impression that an appealable final judgment would not enter until the court decided the plaintiff's pending application for attorneys' fees. Although the impression was mistaken, *see Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988) (holding that the appeal period commences once a final decision on the merits has been entered, irrespective of any claim for attorneys' fees), it proved persistent. The plaintiff's lawyer, no less than defense counsel, labored under the misimpression; he wrote to the defense team on February 2, 1995, stating in relevant part: "I received the Court's memorandum and order on the defendants' motion for J.N.O.V. The only remaining issue *before judgment can be entered* is the plaintiff's unopposed motion for attorney's fees." (Emphasis supplied).

Unbeknownst to the parties, however, the court had granted the plaintiff's motion for attorneys' fees in late 1994. The clerk entered this order on the docket but, apparently, neglected to serve copies of the order or the docket entry on counsel. To complicate matters further, when defense counsel made inquiries to the clerk in February and March of 1995 as to whether an order had been entered disposing of the fee application, the clerk said that one had not.

Last but not least, although all counsel in one way or another had actual notice of the order that denied the defendants' motions for judgment n.o.v. by February 1, 1995, cases discussing Rule 4(a)(6) differentiate between notice of an order and notice of the entry of the order, indicating that the rule contemplates the latter. *See Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, 452-54 (1st Cir. 1995). In this instance the clerk attempted to furnish

such notice, but one copy of the court's order was addressed incorrectly and returned by the Post Office as undeliverable, while another copy, plucked by a different lawyer from the clerk's office, bore no notation that it had been entered on the docket. From this tangled record the district court concluded that, though at least one defense attorney received actual notice of the entry of the order on February 24, 1995,[5] it was not until April 7, 1995 – when the plaintiff's attorney demanded satisfaction of the judgments – that the defendants received a written notice sufficient to animate Rule 4(a)(6). They filed their excusatory motions within seven days of their receipt of this notice.

Given these facts, and given the confused circumstances that contributed to the muddle, the district court did not abuse its discretion in finding that the requirements of Rule 4(a)(6) had been met and in reopening the time for appeal. Since the defendants all filed their notices of appeal within the 14-day period that began on August 14, 1995, when Judge Saris entered her order reopening the time for doing so, we conclude that the appeals are properly before us.

IV. THE VERDICT FORM

The defendants collectively assert that the district court erred in refusing to declare a mistrial when presented with the original verdict form and added impudence to injury by resubmitting the case for further

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[5] We note, parenthetically, that even this notice came after the 21-day period specified by Rule 4(a)(6) had elapsed.

deliberation. We review the district court's denial of the defendants' motions for a mistrial for abuse of discretion. *See Clemente v. Carnicon-P.R. Mgmt. Assocs.*, 52 F.3d 383, 388 (1st Cir. 1995). We evaluate the judge's related actions, namely, her decisions to reject the original verdict form and to resubmit the matter, under the same standard of review. *See Santiago-Negron v. Castro-Davila*, 865 F.2d 431, 444 (1st Cir. 1989).

The defendants' argument on this point boils down to a claim that the district court crafted a verdict form that was structurally flawed; that the jury responded to it by returning two irreconcilable findings; and that, therefore, Judge Saris should have granted the defendants' motions for a mistrial. But it is not enough to preserve the defendants' point that, after the jury first returned with the verdict form, the defendants pounced on the perceived inconsistency and moved to pass the case. Rather, the viability of this assignment of error harks back to the circumstances surrounding the emergence of the verdict form. Although the defendants now say that the form tempted potential confusion, they failed to object when the judge initially submitted it to the jury. The failure to object to the structure of a verdict form before the jury retires, like the failure to object to any other portion of the judge's charge, constitutes a waiver. *See* Fed. R. Civ. P. 51; *see also Phav v. Trueblood, Inc.*, 915 F.2d 764, 769 (1st Cir. 1990) (holding that Rule 51 applies to verdict forms as well as to the trial court's oral instructions); *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 918 (1st Cir. 1988) ("If a slip has been made, the parties detrimentally affected must act expeditiously to cure it, not lie in wait and ask for another trial when matters turn out not to their liking.").

We need not probe this point too profoundly, for in all events the judge handled the perceived incongruity in an agreeable manner. When a verdict appears to be internally inconsistent, the safest course – in the absence of irreparable damage, and none appears here – is to defer its acceptance, consult with counsel, give the jury supplemental instructions, and recommit the matter for further consideration. *See Hafner v. Brown*, 983 F.2d 570, 575 (4th Cir. 1992) ("If the district judge concludes that an inconsistent verdict reflects jury confusion or uncertainty, he or she has the duty to clarify the law governing the case and resubmit the verdict for a jury decision."); *Poduska v. Ward*, 895 F.2d 854, 856 (1st Cir. 1990) (deeming it "precisely correct" for a judge, faced with an unclear and inconsistent jury verdict, to provide supplemental instructions and then recommit the matter to the jury). This is exactly the course of action that Judge Saris followed. The actual instructions that she gave, first orally and then in a written response to a jury question, were unimpugnable.[6] We discern no error, no unfairness, and no abuse of discretion either in the judge's handling of matters related to the verdict form or in her denial of the defendants' motions for a mistrial.

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[6] Neither Bogan nor Roderick voiced any objection to the court's supplemental instructions. The lone objection lodged by the City challenged the judge's interchanging of "real reason" and "true reason" during her supplemental instructions. The judge understandably dismissed this objection as nitpicking, and the City (wisely, in our view) has not resuscitated it on appeal.

V. MUNICIPAL LIABILITY

We turn now to the City's principal assignment of error. Clearly, a municipality may be held liable under section 1983 for the passage of a single ordinance or piece of legislation. *See, e.g., Pembaur v. City of Cincinnati,* 475 U.S. 469, 480 (1986). Although municipal liability cannot be based on the doctrine of respondeat superior in this context, *see Monell,* 436 U.S. at 691, such liability can flow from a finding that the city itself has acted through an official decision of its legislative body.[7] Hence, from a purely theoretical standpoint, nothing prevents a determination that, if the ordinance here in question – which was passed by a majority vote of the Fall River City Council and approved by the mayor – violates the plaintiff's First Amendment rights, then the City is liable for the violation under section 1983.

We pause at this juncture. We think it is important to note early on that the defendants have not challenged the premise, or the district judge's confirmatory ruling, that Scott-Harris' speech was protected by the First Amendment in the sense needed to give rise to a claim under section 1983. Yet the Supreme Court has laid down important restrictions: to give rise to a section 1983 action, a plaintiff's speech must have been on a matter of public concern, and her interest in expressing herself must not be outweighed by the state's interest as

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[7] Such a decision can be manifested either through the enactment of an ordinance or through the adoption of a municipal policy. *See, e.g., Pembaur,* 475 U.S. at 479-81; *Monell,* 436 U.S. at 690. Thus, adoption-of-policy cases are pertinent to a survey of enactment-of-ordinance cases.

employer in promoting the efficiency of the services that it performs. *See Waters v. Churchill,* 114 S. Ct. 1878, 1884 (1994); *Connick v. Myers,* 461 U.S. 138, 142 (1983).

Given the Supreme Court's application of these tests in *Connick,* 461 U.S. at 147-54, one could argue that Scott-Harris' comments about, and efforts to discipline, a particular employee do not qualify as speech on a matter of public concern. We do not pursue this point because it has not been argued to us; it has, therefore, effectively been waived. We mention it, however, because we do not intend our opinion to be taken as deciding that the facts here asserted comprise protected speech.

We note, moreover, that there is another unusual twist to this case. In most similar instances, the constitutional deprivation is apparent on the face of the ordinance or in the text of the challenged municipal policy, thus eliminating any need for a predicate inquiry into the motives of individual legislators. *See, e.g., City of Oklahoma City v. Tuttle,* 471 U.S. 808, 822-23 (1985); *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 251-53 (1981); *Bateson v. Geisse,* 857 F.2d 1300, 1303 (9th Cir. 1988); *Little v. City of N. Miami,* 805 F.2d 962, 967 (11th Cir. 1986); 18A James Perkowitz-Solheim et al., *McQuillin Mun. Corp.* § 53.173 (3d ed. 1993). Here, by contrast, the City enacted an ordinance which, on its face, is benign. In cases like this one, implicating the exercise of First Amendment rights, liability under section 1983 can attach to the passage of a facially benign law only if one peers beneath the textual facade and concludes that the legislative body acted out of a constitutionally impermissible motive. This is a delicate business, but this court previously has sanctioned an investigation into the motives that underlay the

enactment of a facially neutral ordinance for the purpose of assessing liability under section 1983, *see Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 23 (1st Cir. 1992), and we are bound by that precedent.

Still, the accumulated jurisprudence leaves perplexing problems of proof unanswered. The baseline principle is well-settled: legislators' bad motives may be proven by either direct or circumstantial evidence. *See, e.g., United States v. City of Birmingham*, 727 F.2d 560, 564-65 (6th Cir.), *cert. denied*, 469 U.S. 821 (1984); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064-65 (4th Cir. 1982). But this principle speaks to the *qualitative* nature of the evidence that is gathered; it does not address the *quantitative* question. That question is best framed as follows: How many municipal legislators (or, put another way, what percentage of the legislative body) must be spurred by a constitutionally impermissible motive before the municipality itself may be held liable under section 1983 for the adoption of a facially neutral policy or ordinance? This is a difficult question, and the case law proves a fickle companion.

Some courts appear to have held that the plaintiff must adduce evidence sufficient to show that a majority of the members of the legislative body acted from a constitutionally proscribed motive before this kind of municipal liability can attach. Often this position is implied rather than specifically articulated. *See generally United States v. City of Yonkers*, 856 F.2d 444, 457-58 (2d Cir. 1988). But some courts have been more forthcoming. In *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994), a group of homeless persons alleged that the city

had adopted a policy of excluding them from the community. The plaintiffs based their section 1983 action on the acts and statements of one individual on a five-member city council. The court observed that a single council member did not have any authority either to establish municipal policy or to bind the municipality. *See id.* at 1343-44. It therefore examined the evidence against the other four councilors, finding that two had opposed the alleged policy and that two had expressed no views on the subject. The court refused to draw an inference of discriminatory intent from the silence of council members, *see id.* at 1344 n.5, and rejected the plaintiffs' claim.

Other courts, acting principally in the areas of race and gender discrimination, have not required evidence of the motives of a majority of the legislative body before imposing liability on the municipality under section 1983. Representative of this line of cases is *United States v. City of Birmingham*, 538 F. Supp. 819 (E.D. Mich. 1982), *aff'd*, 727 F.2d 560 (6th Cir. 1984). There, the district court held a city liable for violations of the Fair Housing Act, 42 U.S.C. §§ 3604(a), 3617 (1994), based on the actions of a seven-member municipal commission which had blocked the construction of racially-integrated housing by a four-to-three vote. While opponents of the project had attributed their position to a series of articulated non-discriminatory rationales, the court looked behind their avowals and ruled, based on a combination of direct and circumstantial evidence, that racial considerations actually propelled the commission's action. 538 F. Supp. at 826-27. The court concluded that the city could be held liable for the commissioners' animus even though there was no proof of the motives of all four commissioners

who voted to kill the project; it was enough, the court suggested, if "racial considerations were a motivating factor among a significant percentage of those who were responsible for the city's [rejection of the project]." *Id.* at 828. Explicating this construct, the court indicated that a "significant percentage" would not have to encompass the entire four-person majority. *See id.* at 828-29. Noting evidence that racial concerns motivated "at least two of the four members of the majority faction," the court declared that "[t]hat fact alone may be sufficient to attribute a racially discriminatory intent to the City." *Id.* at 829.[8]

Two Massachusetts cases also premise municipal liability on evidence concerning less than a majority of the relevant legislative body. In *Southern Worcester County Regional Voc. Sch. Dist. v. Labor Relations Comm'n*, 436 N.E.2d 380 (Mass. 1982), the Supreme Judicial Court (SJC) upheld a lower court's finding that the plaintiffs had been discharged based on their union activity. The SJC declared that "it is not fatal to the [plaintiffs'] claims that only three of the seven members of the school committee

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[8] This rationale finds succor in *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1221-23 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988), in which the court of appeals held the city liable for Fair Housing Act violations. Though the city's liability derived from the actions of a 12-member city council, the court focused almost exclusively on statements by the mayor (who had only one vote on the council) and race-based opposition expressed by a few other councilors. The court did not premise its decision on a requirement that a majority of the council had acted out of impermissible motives.

made anti-union statements." *Id.* at 385. The court concluded that the three members' statements, coupled with evidence of bias on the part of the school superintendent (who had no vote), sufficed to support the finding of liability. *See id.* Similarly, in *Northeast Metro. Regional Voc. Sch. Dist. Sch. Comm. v. MCAD*, 575 N.E.2d 77 (Mass. App. 1991), a gender discrimination case involving a refusal to hire, the court noted that direct evidence of bias had been exhibited by only two of the twelve members of the school committee. *See id.* at 81. The court upheld a finding of liability based on this evidence and on statements by three other committee members that the plaintiff had been a victim of discrimination and/or had been the best qualified candidate for the job. *See id.* at 81-82.

The precedent in this area is uncertain, and persuasive arguments can be made on both sides. On the one hand, because a municipal ordinance can become law only by a majority vote of the city council, there is a certain incongruity in allowing fewer than a majority of the council members to subject the city to liability under section 1983. On the other hand, because discriminatory animus is insidious and a clever pretext can be hard to unmask, the law sometimes constructs procedural devices to ease a victim's burden of proof. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) (establishing presumptions for use in Title VII cases); *Mesnick v. General Elec. Co.*, 950 F.2d 816, 823-24 (1st Cir. 1991) (adopting comparable format for age discrimination cases), *cert. denied*, 504 U.S. 985 (1992). Where, as here, a plaintiff alleges that a city's councilors connived to victimize her by the pretextual passage of a facially neutral ordinance, it may be overly mechanistic

to hold her to strict proof of the subjective intentions of a numerical majority of council members.

Cognizant of these competing concerns, we eschew for the time being a bright-line rule. Rather, we assume for argument's sake (but do not decide) that in a sufficiently compelling case the requirement that the plaintiff prove bad motive on the part of a majority of the members of the legislative body might be relaxed and a proxy accepted instead. Nevertheless, any such relaxation would be contingent on the plaintiff mustering evidence of both (a) bad motive on the part of at least a significant bloc of legislators, and (b) circumstances suggesting the probable complicity of others. By way of illustration, evidence of procedural anomalies, acquiesced in by a majority of the legislative body, may support such an inference. *See, e.g., City of Birmingham*, 727 F.2d at 564-65; *Town of Clarkton*, 682 F.2d at 1066-67. By like token, evidence indicating that the legislators bowed to an impermissible community animus, most commonly manifested by an unusual level of constituent pressure, may warrant such an inference. *See, e.g., United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1221-25 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); *City of Birmingham*, 538 F. Supp. at 824-27. The key is likelihood: Has the plaintiff proffered evidence, direct or circumstantial, which, when reasonable inferences are drawn in her favor, makes it appear more probable (i.e., more likely than not) that discrimination was the real reason underlying the enactment of the ordinance or the adoption of the policy?

The facts of this case do not require that we refine the point to any further extent. Scott-Harris has not only failed to prove that a majority of the councilors possessed

a bad motive, but she also has failed to furnish enough circumstantial evidence to ground a finding that, more likely than not, a discriminatory animus propelled the City Council's action.

The evidence, viewed most hospitably to the plaintiff,[9] reveals that six of the nine councilors voted in favor of the challenged ordinance and two opposed it. The plaintiff presented sufficient evidence from which a jury could deduce that one of these six, Roderick, along with Mayor Bogan (who did not have a vote), acted out of a bad motive.[10] The plaintiff also produced some glancing evidence apropos of Councilor Mitchell: he and Roderick were friends; Roderick spoke to him about the Biltcliffe/Scott-Harris imbroglio; and Biltcliffe called him, presumably to protest her treatment. The jury could have found from other evidence in the case that Mitchell probably voted in favor of the ordinance (although the record does not eliminate the possibility that he abstained). Even though Mitchell did not testify and the substance of his conversations with Roderick and Biltcliffe are unknown,

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[9] On the question of evidentiary sufficiency, we review de novo the denial of the City's motion for judgment n.o.v. *Gibson v. City of Cranston*, 37 F.3d 731, 735 (1st Cir. 1994). We are bound by the same decisional standards that bound the court below: we must evaluate the record without regard to witness credibility, testimonial conflicts, or unevenness in the weight of the evidence, *see id.*, and we must affirm unless, after surveying the evidence and the inferences derivable therefrom in the light most flattering to the plaintiff, we determine that a rational factfinder could not have resolved liability in her favor, *see Veranda Beach Club*, 936 F.2d at 1375.

[10] We discuss the evidence against Roderick and Bogan in Part VI(C), *infra*.

we assume arguendo that a jury reasonably could infer that Mitchell, too, acted for a proscribed reason.

The remaining gaps in the plaintiff's proof are considerably more difficult to overlook. None of the other seven city council members uttered any untoward statements or engaged in any suspicious actions. The "we must slash the budget" pretext had a ring of plausibility, and from aught that appears, none of these seven individuals had any way of knowing that the position-elimination ordinance would not save the City sorely needed funds. Nor is there strong circumstantial evidence of complicity; indeed, the record tells us almost nothing about the inclinations of the silent seven.[11] Moreover, the plaintiff made virtually no effort to adduce such evidence. She neither deposed any of the seven nor called them as witnesses at trial. She did not attempt to show that any of the other four councilors who voted for the ordinance had any basis for doubting the truth of the party line ("we must slash the budget") or that they possessed ties to Roderick or Bogan, or that they were beholden to Biltcliffe, or that they were hostile to Scott-Harris. The stark fact is that the motivations of the council members – other than Roderick and Mitchell – did not receive individualized scrutiny. By any responsible standard, this sparse evidence falls short of providing a proper predicate for a finding of municipal liability.

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[11] The record does show that one council member who voted against the ordinance, John Medeiros, called the plaintiff and asked why "they" were trying to get rid of her. But the plaintiff provided no insight into who "they" might be and no evidence that "they" comprised a majority, or even a significant bloc, of the City Council.

We do not think it is a coincidence that in every analogous case in which municipal liability has been imposed on evidence implicating less than a majority of a legislative body, substantial circumstantial evidence existed from which the requisite discriminatory animus could be inferred. In *City of Birmingham*, the evidence showed that the race-based opposition of constituents to integrated housing was widespread, pronounced, and vociferously articulated. After several members who supported the racially integrated development were ousted from office, the commission responded to this unremitting pressure and took the unprecedented step of submitting the proposal to a community referendum. 538 F. Supp. at 826-29. In *Yonkers Bd. of Educ.*, the requisite inference was supported by evidence of massive constituent agitation as well as by "departures from the normal procedural sequence" in respect to the challenged proposal. 637 F.2d at 1221.

In this case no such evidence exists. Nothing suggests the City Council deviated from its standard protocol when it received and enacted the ordinance that abolished the plaintiff's job. Nothing suggests that the vote took place in an atmosphere permeated by widespread constituent pressure.[12] Putting speculation and surmise to one side, it simply cannot be inferred that more than two of the council members who voted to abolish the

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[12] The plaintiff's assertion that the publication of front-page articles about her plight in the local newspaper shows constituent coercion will not wash. There is a significant difference between heightened public interest – an environmental phenomenon with which legislatures grapple constantly – and pervasive constituent pressure.

plaintiff's position did so to punish her for protected speech. We cannot rest municipal liability on so frail a foundation. Because no reasonable jury could find against the City on the proof presented, Fall River's motion for judgment as a matter of law should have been granted.

VI. INDIVIDUAL LIABILITY

Roderick and Bogan advance a different constellation of arguments in support of their motions for judgment n.o.v. We treat these arguments sequentially.

A. Legislative Immunity.

The individual defendants concentrate most of their fire on the district court's rendition of the doctrine of legislative immunity. While municipalities do not enjoy immunity from suit under section 1983, *see Leatherman v. Tarrant County Narcotics Intell. & Coord. Unit*, 507 U.S. 163, 166 (1993), lawmakers have absolute immunity from civil liability for damages arising out of their performance of legitimate legislative activities. *See Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 629-30 (1st Cir. 1995). This immunity derives from federal common law and, under existing Supreme Court precedents, embraces state lawmakers, *see Tenney*, 341 U.S. at 376, and regional officials, *see Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 (1979).[13]

[13] Members of Congress enjoy a parallel immunity from liability for their legislative acts under the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1. *See Doe v. McMillan*, 412 U.S. 306, 324 (1973); *Harwood*, 69 F.3d at 629.

The Court has yet to decide whether local legislators are protected by this strain of absolute immunity, *see Lake Country Estates*, 440 U.S. at 404 n.26 (reserving the question), but the lower federal courts, including this court, have shown no reticence in holding that the doctrine of legislative immunity is available to such persons. *See, e.g., Acevedo-Cordero*, 958 F.2d at 22-23; *Aitchison v. Raffiani*, 708 F.2d 96, 98-100 (3d Cir. 1983); *Reed v. Village of Shorewood*, 704 F.2d 943, 952-53 (7th Cir. 1983); *Bruce v. Riddle*, 631 F.2d 272, 274-80 (4th Cir. 1980). We reaffirm today that the shield of legislative immunity lies within reach of city officials.

This holding does not end our inquiry. Although legislative immunity is absolute within certain limits, legislators are not immune with respect to all actions that they take. The dividing line is drawn along a functional axis that distinguishes between legislative and administrative acts. The former are protected, the latter are not. *See Acevedo-Cordero*, 958 F.2d at 23. We have used a pair of tests for separating the two:

> The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts," such as "generalizations concerning a policy or state of affairs," then the decision is legislative. If the facts used in the decision making are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on "the particularity of the

> impact of the state of action." If the action involves establishment of a general policy, it is legislative; if the action "single[s] out specifiable individuals and affect[s] them differently from others," it is administrative.

Cutting v. Muzzey, 724 F.2d 259, 261 (1st Cir. 1984) (citations omitted).

When the relevant facts are uncontroverted and sufficiently developed, the question whether an act is "administrative" as opposed to "legislative" is a question of law, and it may be decided by the judge on a pretrial motion. *See Acevedo-Cordero*, 958 F.2d at 23. When the material facts are genuinely disputed, however, the question is properly treated as a question of fact, and its disposition must await the trial. *See id.*

In some ways, *Acevedo-Cordero* and this case are fair congeners. There, as here, the defendants asserted that budgetary woes sparked the enactment of a facially benign position-elimination ordinance. There, as here, the plaintiff(s) countered with a charge that, in fact, a constitutionally proscribed reason lurked beneath the surface. There, as here, conflicted evidence as to the defendants' true motives raised genuine issues of material fact. *Acevedo-Cordero* teaches that in such situations the issue of immunity must be reserved for the trial. *See id.*

Judge Saris faithfully applied these teachings, refusing to reward premature attempts by the individual defendants to dismiss the action on the basis of legislative immunity. At the end of the trial, the jury made two crucial findings. First, it found that the defendants' stated reason for enacting the position-elimination ordinance

was not their real reason. Second, it found that the plaintiff's constitutionally sheltered speech was a substantial or motivating factor in the actions which Roderick and Bogan took vis-à-vis the ordinance. These findings reflect the jury's belief that the individual defendants relied on facts relating to a particular individual – Scott-Harris – in the decisionmaking calculus and devised an ordinance that targeted Scott-Harris and treated her differently from other managers employed by the City.

We think that in passing on the individual defendants' post-trial motions, the judge in effect accepted these findings and concluded that the position-elimination ordinance (which, after all, constituted no more in this case than the means employed by Scott-Harris' antagonists to fire her) constituted an administrative rather than a legislative act. As long as the quantum of proof suffices – a matter to which we shall return – both this conclusion and its natural corollary (that Roderick and Bogan are not shielded from liability by operation of the doctrine of legislative immunity) rest on solid legal ground.[14] *See, e.g., Negron-Gaztambide v. Hernandez-Torres*, 35 F.3d 25, 27-28 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1098 (1995); *Vacca v. Barletta*, 933 F.2d 31, 33 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991).

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[14] The defendants do not assert a claim of qualified immunity, nor would such a claim be fruitful here. It was clearly established at the time of the plaintiff's ouster that public officials could not constitutionally punish a public employee for protected speech. *See Mt. Healthy*, 429 U.S. at 283-84.

B. Causation.

Roderick has another string to her bow. She posits that, as a matter of law, her actions in respect to the position-elimination ordinance cannot be deemed the proximate cause of the harm to Scott-Harris.[15] She bases this claim on the fact that her vote alone was impuissant: five votes would ensure enactment of the ordinance, but six legislators voted for passage. Thus, not only was she unable to get the ordinance enacted by herself, but it also would have been passed without her cooperation. This thesis has a patina of plausibility, but it misstates the question before us (and, consequently, we take no view of it).

According to accepted lore, section 1983 actions are to be considered against the background of traditional tort principles. *See Monroe v. Pape*, 365 U.S. 167, 187 (1961); *Wagenmann v. Adams*, 829 F.2d 196, 212 (1st Cir. 1987). In tort law, determinations relating to causation are customarily "question[s] of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." *Springer v.*

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[15] Bogan does not press a comparable claim, probably because, as he concedes in his brief, the plaintiff's ouster required two distinct steps: (1) the mayor's proposal of the ordinance, and (2) a favorable vote by a majority of the city council. Although both events were necessary, Bogan's actions could properly be considered a proximate cause of the ultimate harm. *See Wagenmann v. Adams*, 829 F.2d 196, 212 (1st Cir. 1987) (upholding a jury finding that a police officer's characterization of plaintiff's conduct was a proximate cause of excessive bail, even though a judicial officer was responsible for the ultimate bail decision).

Seaman, 821 F.2d 871, 876 (1st Cir. 1987) (citations omitted). Phrased another way, "[a]pplication of the legal cause standard to the circumstances of a particular case is a function ordinarily performed by, and peculiarly within the competence of, the factfinder." *Swift v. United States*, 866 F.2d 507, 510 (1st Cir. 1989).

In this instance, the judge charged the jury as follows:

> The defendant's actions are the legal cause of the plaintiff's injuries if [they were] a substantial factor in bringing about the harm. . . . It does not matter whether other concurrent causes contributed to the plaintiff's injuries so long as you find that the defendant's actions were a substantial factor in producing them. If defendant's actions were a substantial factor, then they were the legal cause or what we call the proximate cause.

Because no one objected to these instructions, they, whether or not entirely accurate, are the law of the case.[16] *See Moore v. Murphy*, 47 F.3d 8, 11 (1st Cir. 1995); *Milone v. Moceri Family, Inc.*, 847 F.2d 35, 38-39 (1st Cir. 1988).

We believe that the jury, applying this standard to the facts before it, could reasonably have concluded that Roderick's overall conduct was a substantial factor in

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[16] We do not mean to suggest that the particular instructions given here are problematic. To the contrary, they appear at first blush to comport with precedent. *See Furtado v. Bishop*, 604 F.2d 80, 89 (1st Cir. 1979) (discussing causation in the context of section 1983), *cert. denied*, 444 U.S. 1035 (1980); *see also O'Brien v. Papa Gino's of Am., Inc.*, 780 F.2d 1067, 1072 (1st Cir. 1986).

depriving the plaintiff of her constitutional rights. After all, Roderick was not just another face in the crowd: she served as vice-president of the City Council and chaired its ordinance committee; as a result, the jury easily could find that she played a role in the passage of the ordinance that was disproportionate to her single vote. In order to gain approval, the ordinance had to go through the five-member ordinance committee. Roderick established this committee's agenda, and its favorable report on March 5 cleared the way for the ordinance's enactment.[17]

Although the plaintiff's evidence in this regard is not robust, it suffices in the context of the record as a whole to render the issue of causation susceptible to differing evaluative determinations. Thus, the district judge did not err in submitting the causation question to the jury. And because the jury reasonably could have adopted one such view of the evidence and concluded that Roderick made a successful effort to have the plaintiff ousted, the liability finding must stand.

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[17] The fact that other causes (i.e., the votes of fellow council members) concurrently contributed to the harm neither insulates Roderick's conduct nor undercuts the jury's verdict. *See Ricketts v. City of Columbia*, 36 F.3d 775, 779 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1838 (1995); *Wagenmann*, 829 F.2d at 211-13; *see generally Marshall v. Perez Arzuaga*, 828 F.2d 845, 848 (1st Cir. 1987) (stating that a "defendant is liable if his negligence is a proximate cause of the damage although it might not be *the sole* proximate cause of such damage") (emphasis in original; citations omitted), *cert. denied*, 484 U.S. 1065 (1988).

C. Sufficiency of the Evidence.

Roderick and Bogan, in chorus, assert that insufficient evidence exists from which a jury lawfully could find that the desire to punish the plaintiff for her protected speech was a substantial or motivating factor behind the actions which they took. This assertion is easily refuted.

In challenging a jury verdict on sufficiency grounds, a defendant labors under a heavy burden. *See supra* note 9 (elucidating applicable legal standard and citing cases). Because the evidence in this case is capable of supporting two sets of divergent inferences, Roderick and Bogan cannot carry their burden.

We choose not to tarry. It suffices to say that, on this pleochroic record, the jury could have found that Biltcliffe used political connections to hinder the investigation of Scott-Harris' accusations by, *inter alia*, banishing the accuser, and that Roderick and Bogan were the instruments of her vengeance. Roderick bore an animosity toward Scott-Harris based on a history of friction between the two women, and the jury permissibly could have found that when Biltcliffe complained to her about Scott-Harris' charges, she spoke to Connors; that when Scott-Harris persisted, Roderick agreed to push the position-elimination ordinance despite the fact that Scott-Harris was performing her duties well; that the asserted budgetary basis for the ordinance was a sham;[18] and that Roderick knew as much.

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[18] On this point, the evidence permitted the jury to conclude that, rather than saving money, the position-elimination ordinance actually cost more because it necessitated

As to Bogan, much of the same evidence is relevant. In addition, the jury could have found that he knew Biltcliffe and resented Scott-Harris' outspoken efforts to cashier her; that he abetted the effort to save Biltcliffe's sinecure by terminating Scott-Harris (and no other manager) for a bogus reason; that he proposed the position-elimination ordinance to that end, notwithstanding Connors' opposition; that he happily signed it into law; that when he learned of Scott-Harris' intention to accept a different municipal position at a reduced salary, he pulled the rug from under her by increasing the responsibilities of the job and shifting her to a dingy office; that when Scott-Harris tried to retract her rejection of this diminished position, he foiled her efforts to do so; and that in all events Bogan showed his true colors by shortening Biltcliffe's suspension.

To be sure, this set of conclusions does not flow ineluctably from the evidence, but it represents a permissible construction of the record. Consequently, the evidence is adequate to support the verdicts against both Roderick and Bogan.

VII. ATTORNEYS' FEES

Our journey is not yet ended. The last leg requires us to revisit the lower court's order awarding the plaintiff $83,179.70 in counsel fees and associated expenses against three defendants (Roderick, Bogan, and the City), jointly and severally.

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the hiring of three new administrators to manage agencies that the plaintiff had been supervising single-handed.

In a section 1983 action a court, "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1994). Despite its seemingly precatory tone, we have interpreted this language to mean that "a prevailing plaintiff is presumptively entitled to fee-shifting" in a section 1983 case. *Casa Marie Hogar Geriatrico, Inc. v. Rivera-Santos*, 38 F.3d 615, 618 (1st Cir. 1994); *accord Foster v. Mydas Assocs., Inc.*, 943 F.2d 139, 145 (1st Cir. 1991) (stating that a prevailing civil rights plaintiff's entitlement to a fee award "comes almost as a matter of course"). For this purpose, a party prevails if she succeeds on a significant issue in the litigation and thereby achieves all or some meaningful part of the benefit that she envisioned when she brought suit. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Pearson v. Fair*, 980 F.2d 37, 43 (1st Cir. 1992). The converse, of course, is equally true: if a plaintiff's claims against a particular defendant come to naught, she is not a prevailing party and is not entitled to reap a harvest under section 1988. *See Nunez-Soto v. Alvarado*, 956 F.2d 1, 3 (1st Cir. 1992). Moreover, if a plaintiff succeeds in the trial court but the judgment she obtains is reversed on appeal, she is no longer entitled to a fee award. *See Globe Newspaper Co. v. Beacon Hill Arch. Comm'n*, 100 F.3d 175, 195 (1st Cir. 1996).

Applying these standards to the case at bar, it is evident that the matter of attorneys' fees must be rethought. Because the plaintiff prevailed below on claims against all three defendants, none of them opposed her application for fees. In their appeals, however, they preserved the issue of whether (and to what extent) the fee award could withstand the reversal on

appeal of all or some part of the judgments. This precaution serves the City in good stead; because the judgment against it must be reversed, *see supra* Part V, the fee award against it must be nullified.

This leaves a nagging question as to the status of the award vis-a-vis Roderick and Bogan. On the one hand, the judgments against those two defendants remain intact, *see supra* Part VI, and, thus, as to them, the plaintiff remains a prevailing party presumptively entitled to reasonable attorneys' fees. On the other hand, the record before us is opaque as to the proper extent of that entitlement. This opacity is particularly pronounced because we do not know how much (if any) of the work performed by the plaintiff's lawyer in respect to Scott-Harris' unsuccessful claims against the City paved the way for her successful claims against the individual defendants. This is an important datum because a court may allow fees for time spent on unsuccessful claims only if those claims are sufficiently linked to successful claims. *See Lipsett v. Blanco*, 975 F.2d 934, 940-41 (1st Cir. 1992); *Aubin v. Fudala*, 782 F.2d 287, 290-92 (1st Cir. 1986).

We need go no further. From what we have said to this juncture, it is apparent that the matter of fees must be more fully explored – and it is preferable for obvious reasons that the trial court, as opposed to this court, undertake what amounts to an archeological dig into counsel's time sheets and make the necessary factual determinations. We therefore vacate the fee award against the City and remand so that the district court can reconsider the amount of fees and costs that should properly be assessed against the remaining defendants.

The plaintiff also has prevailed on appeal against two of the defendants, and she is entitled to a reasonable counsel fee for the work that yielded this victory. Though we often entertain such fee applications directly, we have sometimes opted to have the district court handle them. *See, e.g., Rodi v. Ventetuolo*, 941 F.2d 22, 31 (1st Cir. 1991); *see also* 1st Cir. Loc. R. 39.2 (permitting use of this alternative). Because the district court must in any event reopen its inquiry into the overall question of fees, we deem it expedient for the plaintiff to file her application for fees on appeal with that court, and for that court to make the supplementary award. We leave to Judge Saris the procedure to be followed on remand in respect to both reexamination of the original award and initial consideration of the supplementary award for services rendered and expenses (apart from ordinary costs) incurred on appeal.

The plaintiff's cross-appeal (No. 95-2100) is denied and the district court's order permitting the reopening of the appeal period is affirmed. The judgment against the City of Fall River is reversed, and the fee award against it is vacated. The judgments against the remaining defendants are affirmed and the case is remanded to the district court for further proceedings in respect to both the previous fee award against these defendants and the question of fees on appeal. No costs are awarded in Nos. 95-1950 and 95-2100; costs are awarded to the plaintiff in Nos. 95-1951 and 95-1952.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,

Plaintiff,

CIVIL ACTION
NO. 91-12057-PBS

v.

CITY OF FALL RIVER,
DANIEL E. BOGAN,
and MARILYN RODERICK,

Defendants.

ORDER OF JUDGMENT

SARIS, D.J. June 3, 1994

This action came before the Court for a trial by jury. The issues have been tried, and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED:

JUDGMENT for the plaintiff, Janet Scott-Harris, on Count Two of the complaint. Compensatory damages are awarded in the amount of One Hundred Fifty-Six Thousand Dollars ($156,000.00). Punitive damages are awarded against defendant Marilyn Roderick in the amount of Fifteen Thousand Dollars ($15,000.00) and against defendant Daniel E. Bogan in the amount of Sixty Thousand Dollars ($60,000.00).

By the Court,

/s/ Deborah C. Whitley
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 95-1950
95-1951
95-1952

JANET SCOTT-HARRIS,
Plaintiff, Appellee,

v.

CITY OF FALL RIVER, ET AL.,
Defendants, Appellants.

Before

Selya and Boudin, *Circuit Judges*.*

ORDER OF THE COURT

Entered: February 24, 1997

Marilyn Roderick and Daniel Bogan have petitioned for panel rehearing. Their joint petition centers on an instruction contained in the verdict form submitted by the trial judge to the jury at the close of all the evidence

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*Judge Aldrich participated in these appeals through and including the issuance of the panel opinion. When new counsel filed the instant petition for rehearing, however, Judge Aldrich removed himself from further consideration of the appeals and has had no role in respect to the petition for rehearing. The remaining two panelists have therefore reviewed the petition for rehearing and issue this order pursuant to 28 U.S.C. § 46(d).

(a copy of which, as completed by the jury, is annexed hereto). The form indicated that the jury should consider certain facts pertinent to the liability of the defendants Roderick (questions 5-7) and Bogan (Questions 8-10) only if it first found a set of facts indicating that their codefendant, the City of Fall River, was liable (questions 1-4).[1] The jury found all the defendants liable. The defendants appealed. In an opinion issued on January 15, 1997, the panel overruled the appeals of Ms. Roderick and Mr. Bogan, but sustained the City's appeal and reversed the verdict against it.

The petitioners now urge that, given the entry of judgment in the City's favor, the instruction on the verdict form requires a similar result as to them. We reject this argument. The law of the case doctrine, on which the petitioners rely, is not a straitjacket but a flexible rule; it will not be applied where to do so would promote injustice. *See Northeast Utils. Serv. Co. v. FERC*, 55 F.3d 686, 688-89 (1st Cir. 1995); *Moore v. Murphy*, 47 F.3d 8, 11 (1st Cir. 1995). This is such a instance.

We adopt this viewpoint for four principal reasons. First, despite being afforded an opportunity for supplemental briefing in connection with their rehearing petition, the petitioners have been unable to articulate any sound legal reason justifying the instruction. For our part, we can think of none; our case law has never demanded a finding against a municipality as a necessary prelude to individual liability for municipal officials. Second, the

[1] The district court also made certain other comments during the trial indicative of this same view.

jury's specific findings, as evidenced by the attached verdict form, clearly demonstrate a solid basis for liability on the part of Ms. Roderick and Mr. Bogan, entirely apart from any consideration of municipal liability. These findings are amply supported by the record. *See* Panel Op. at 32-36. Moreover, they reflect the trial judge's clear direction that the jury had to make separate and distinct liability determinations anent each of the three defendants. Third, the petitioners did not rely upon the verdict form instruction in any discernible way on appeal.

Fourth – and foremost – the petitioners have not shown that any unfair prejudice will result from our disregarding the instruction contained in the verdict form, taking the jury's specific findings at face value, and affirming the judgments on that basis. Indeed, if any prejudice existed from the erroneous inclusion of the newly highlighted instruction in the verdict form, it was prejudice to the plaintiff. Since she successfully proved her case against Roderick and Bogan, reversing the individual judgments would exalt form over substance and work a manifest injustice. We decline to command such a result.

The petition for rehearing is *denied*.

By Order:

/s/ WILLIAM H. NG
Clerk

[cc: Messrs. Fulton, Schwartz, Assad, Marchand and Shirley]